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No. 698

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FARMERS CO-OPERATIVE ELEVATOR ASSOCIATION NON-STOCK OF BIG SPRINGS, NEBRASKA a Cooperative Corporation,

Petitioner,

vs.

ARTHUR C. STRAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Now comes the Petitioner, Farmers Co-Operative Elevator Association Non-Stock Of Big Springs, Nebraska, a Cooperative Corporation, by Jack E. Horsley, of the Bar of this Court, Of Counsel herein, and presents this, its Petition For Writ Of Certiorari To The United States Court of Appeals for the Eighth Circuit, and represents as follows:

Petitioner, Farmers Co-operative Elevator Association Non-Stock of Big Springs, Nebraska, a Cooperative Corporation, by Jack E. Horsley, of the Bar of the Supreme Court of the United States of America, Of Counsel herein, and by its attorneys, respectfully prays that Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, which affirmed a judgment of the United States District Court for the District of Nebraska.

OPINION BELOW

The opinion of the Court of Appeals (App. A-1)[1], after modification following consideration of Petition for Rehearing, is not yet published in official reports, but is designated, in the two cases involved, as Civil Numbers 18606 and 18687, in the records of the Eighth Circuit Court of Appeals.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals was entered on July 25, 1967 (App. 1) and a timely application for rehearing was denied, after slight modification of certain language in the opinion, on August 23, 1967. The jurisdiction of this Court is invoked under the provisions of 28 USC No. 1254 (1) and because of the importance of the question, the need for this Court to exercise its supervisory control, the errors of the Circuit Court of Appeals and the need to harmonize conflicting holdings between circuit of the Court of Appeals.

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[1] "App." refers to the appendices to this petition.

QUESTIONS PRESENTED

A

Is a contractee liable for injuries to an employee of a contractor if they were caused by a latent defect of which the contractee had no knowledge and the employee was aware?

B

May a case be submitted to a jury where the litigant upon whom the burden of proof is imposed has failed to offer any evidence upon which the jury might find a verdict in favor of such litigant?

C

Where there is no credible evidence, with its intendments most favorable to a plaintiff, to show that he was free of contributory negligence, may a case in which the defendant's liability is premised upon negligence, in a contributary negligence state, be submitted to a jury?

D

Where an employee, knowing and comprehending the danger, voluntarily exposes himself to it, even though he is free of negligence in that respect, and the defendant's theory is that the plaintiff assumed risk, is not the defendant entitled to proper instructions to the jury on the doctrine of assumption of the risk?

E

Where, by mistake, administrative rules not in effect at the time the cause of action arose, are received in evidence and form the basis for instructions to the jury, is not the aggrieved litigant entitled to relief under Rule 60 (b), Federal Rules of Civil Procedure?

F

Where the substantive law of a jurisdiction proscribes informing the jury, in a damages case, that the defendant is insured against liability, and the jury is erroneously so informed, is not the defendant entitled to post-trial relief?

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix "B", infra, pp. 27-46: Nebraska Safety Regulations governing use of ladders, Section 48-425; Nebraska Safety Regulations relating to assumption of risk, Section 48-435; Nebraska Safety Regulations relative to the adoption of Safety Codes, Section 48-412; Rules of Administrative Agencies defined, Section 84-901; Rules of Administrative Agencies, Filing Requirements, Section 84-902; Rules of Administrative Agencies, Publication, Section 84-903; Rules of Administrative Agencies, Approval of Attorney General, Section 84-905.01; Rules of Administrative Agencies, Effective only if filed with Secretary of State, Section 84-906; Rules of Administrative Agencies, Hearing, Section 84-907; Rules of Administrative Agencies, Effective Adoption, Section 84-908; and Nebraska Safety Regulations, Right to Adopt Safety Codes, Section 48-413.

STATEMENT OF THE CASE.

This case originated with the filing of a Complaint by Arthur C. Strand, a California resident, hereinafter called "Strand", against Farmers Cooperative Elevator Association, Non-Stock, of Big Springs, Nebraska, a Nebraska corporation, hereinafter called "Coop". Strand alleges jurisdiction by way of diversity of citizenship.

In the spring of 1960, Wilmac Construction Co., hereinafter called "Wilmac" entered into a contract with the Coop to reconstruct completely an old wooden grain elevator and to replace the buildings with new metal structures. One of the first tasks was to tear down an old wooden "headhouse" and to start reconstruction of a new metal structure. A ladder from the old structure was saved by Wilmac and was used by them in the construction of the new metal headhouse. (App. 16) One of the rungs on the old ladder was removed by the foreman of Wilmac. Subsequently, in the early summer of 1960, Strand came on the job site as an employee of Wilmac. He worked his way up to where he became a "straw boss" on the job. During the Summer, he constructed a catwalk from the headhouse across the bins and down the side. In October of 1960, he was welding in an upper portion of the headhouse. At quitting time, which was near dusk, he closed the door leading to the catwalk, walked to the old ladder and began his descent down through the small opening in the steel headhouse floor. The first rung beneath the headhouse floor was approximately 22 inches below the headhouse floor, because the rung immediately below the floor was the one which had been removed by Wilmac's foreman. Strand stated he

had both feet on the rung below the headhouse floor, that he started to proceed on down the ladder, that he caught his pants leg on a nail where the missing rung had been, and fell backwards to the ground and sustained serious injuries.

During the trial, the plaintiff's counsel presented defendant's attorney with a certificate from the Nebraska State Safety Engineer which certified that attached safety regulations were "in effect from 1940 until this date." (App. 35) Plaintiff's counsel requested defense counsel to waive foundation based on the certificate of the State Safety Engineer. Defense counsel acquiesced to this request and did waive foundation. It was later developed that the certificate did not reflect the facts. The Safety Codes that were attached to the certificate presented at the time of trial were not adopted by the State of Nebraska until four years after the accident. The State Safety Engineer stated that he sent a copy of the 1958 Construction Code with his certificate; however, this was not attached to the Exhibit which was presented.

The inapplicable Safety Code was used as a basis for the instructions of the Court to the jury, and the jury was advised that a violation of any one of these Safety Codes was negligence as a matter of law. The defendant did not violate any of the Safety Code Regulations which were in force and effect at the time of the accident.

The defendant requested that the Court instruct the jury not only on the defense of contributory negligence, but also on the defense of assumption of risk. The Court refused this instruction, made no comment at all on the doctrine of assumption of risk, except to advise the jury that the doctrine of assumption of risk was not applicable in this case.

An affidavit obtained from a juror after the trial establishes that the jury discussed in detail the question of insurance coverage of the respective parties involved in the litigation. By the Nebraska law, this alone is grounds for a new trial.

On May 13, 1966, a jury at the United States District Court in North Platte, Nebraska, returned a verdict for the plaintiff in the sum of $200,000.00.

Later a Motion for Relief of Final Judgment under Rule 60(b) was filed, and was subsequently overruled by the District Court. The case was appealed to the United States Court of Appeals for the Eighth Circuit, which Court affirmed the judgment on July 25, 1967.

ARGUMENT

May It Please The Court:

The reasons for granting the writ comprise:

I.

The Importance Of The Questions

It has been consistently held in Nebraska that:

A contractee is liable for injuries caused the employee of the contractor only if they were caused by a latent defect of which the contractee was aware and the employee unaware;

There must be some evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of such proof is imposed, or a verdict must be directed;

Where uncontrovertible evidence of physical facts shows the injuries could not have occurred if the plaintiff had been free of contributory negligence, even if *a arguendo,* some evidence discloses the defendant was negligent, the plaintiff is precluded from recovery;

Where an employee knows and comprehends the danger and voluntarily exposes himself to it, even if he be free of negligence or if a question of fact on the issue of contributory negligence exists, he assumes the risk of such danger and cannot recover for injuries resulting from such risk; and that

A verdict returned for a plaintiff by a jury having knowledge that the defendant is insured must be set aside.

Moreover, under the Federal Rules of Civil Procedure, where, by mistake, administrative rules not in effect at the time of the occurrence are received in evidence, and discussed in the instructions to the jury, the aggrieved litigant is entitled to relief (Rule 60[b], Federal Rules of Civil Procedure).

Nevertheless, the decisions of the District Court and Court of Appeals of the Eighth Circuit reject, without differentiating the instant case, each of these principles.

The questions are important because the holdings below create serious confusion on these significant principles of law.

II.

The decision of the Court of Appeals of the Eighth Circuit conflicts with the decisions of other Courts of Appeals on the same points.

Rule 60, (b), Federal Rules of Civil Procedure, has been held in the Court of Appeals for the District of Columbia (*Griffin* v. *Kennedy*, 344 Fed. [2d] 198 [1965]) and in the Court of Appeals for the Second Circuit (*Fleming* v. *Heubsch Laundry Corporation*, 159 Fed. [2d] 581 [1947]) to require that relief should be granted where, by mistake, administrative rules not in effect at the time of the occurrence are received in evidence and form the basis of instructions given by the Court to the Jury. The decision of the Eighth Circuit Court of Appeals, however, holds to the contrary, without reciting any valid grounds distinguishing the case at bar from the others.

III.

The holding so far departs from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

To reject the established law of Nebraska and create conflicts with the decisions of other Courts of Appeals on the same matters calls for an exercise of this Court's supervisory powers.

Strand, as Wilmac's employee, was, under the established law of Nebraska, in the legal status of this petitioner's "invitee". (*Dabelstein* v. *City of Omaha*, 132 Neb. 710, 273 N.W. 43; *Niemeyer* v. *Forburger*, 172 Neb. 876, 112 N.W. 2d 276.) Wilmac had a duty under its contract with this petitioner to make certain repairs to the headhouse portion of the elevator. It altered the condition of the access ladder without this petitioner's knowledge. After this alteration, Strand used the ladder over fifty times and knew all about its condition. In precedential decisions (*Westover* v. *Hoover*, 88 Neb. 201, 129 N.W. 285; *Hines* v. *Martell Telephone Co.*, 127 Neb. 398, 255 N.W. 233 [more fully discussed in the part of this brief having to do with assumption of risk]), directly in point here, injuries caused by similar conditions under like circumstances have been held uncompensable. There is a clear absence of evidence that the defect, *viz.*, a missing rung removed by the contractor, was "latent" to Strand, since he knew all about it. Since he had knowledge and this petitioner had none, and since Strand was an invitee only, the District Court and the Court of Appeals have improperly disregarded the law of Nebraska by rejecting the principle stated in the *Westover* and *Hines* cases.

Likewise, these Courts unwarrantedly refused to follow the rule that a total failure of evidence on an essential element of a claim or defense compels directing a verdict. Strand testified as to how his injuries were received (Exhibit 32 [App. 27]). The version he gave is physically impossible because of the nature of the opening and the

missing rung. Exhibit 32 shows a workman with both feet on the first rung under the headhouse floor and demonstrates that a fall backward would place the subject on that floor on a sitting position. The matter simply could not have happened as Strand testified. Consequently, there was a total failure of evidence that the missing rung and the nail about which Strand testified caused his fall. Where a witness's version of an occurrence is physically impossible, it has no probative value. There was, therefore, a total failure of evidence as to the cause of the injuries and the jury was left to conjecture. The Court should have directed a verdict at the close of the plaintiff's evidence. (*Popken* v. *Farmers Mutual Home Ins. Co.*, 180 Neb. 250, 142 N.W. 2nd 309; *Shamblen* v. *Great Lakes Pipe Line Co.*, 158 Neb. 752, 64 N.W. 2d 728; *McCullough* v. *Omaha Coliseum Corp.*, 144 Neb. 92, 12 N.W. 2nd 639.)

Furthermore, since Nebraska is unequivocally a "contributory negligence" jurisdiction, the rule that a plaintiff whose negligence causes his own injuries, whether it be the sole or a contributing cause, disqualified Strand and the Court should have directed a verdict on trial and the Court of Appeals should have reversed for the Trial Court's failure to do so. Since Strand's recounting of the occurrence facts is unbelievable because the fall could not physically have occurred as he said (See Exhibit 32 [App. 27]), there was likewise a failure of proof to support his obligation to show that he was free of contributory negligence. (*Eaton* v. *Merritt*, 135 Neb. 363, 281 N.W. 620; *Welsh* v. *City of South Omaha*, 98 Neb. 148, 152 N.W. 302, 303; *Gardner* v. *Metropolitan Utilities District*, 134 Neb. 163, 278 N.W. 137; *Kerwin* v. *Thompson, Belden & Co.*, 110 Neb. 251, 192 N.W. 692.)

The rejection of the undeviating law of Nebraska on assumption of the risk by the Trial Judge, who gratuitously instructed the jury, after returning them into the court-room following the first two hours of deliberation, that "* * * assumption of risk is out, period" (Record, 81), deprived this defendant of receiving jury consideration of this pertinent and controlling doctrine. Strand was an invitee as to this petitioner, the contractee (*Dabelstein* v. *City of Omaha,* 132 Neb. 710, 273 N.W. 43; *Niemeyer* v. *Forburger,* 172 Neb. 876, 112 N.W. 2d 276). The doctrine of assumption of risk is applicable in cases between an invitee and the owner of premises. (*Landrum* v. *Roddy,* 143 Neb. 934, 12 N.W. 2d 82; *Dehning* v. *Detroit Bridge & Iron Works,* 46 Neb. 556, 65 N.W. 186. See, also, *Creighton* v. *Keens,* 89 Neb. 637, 131 N.W. 915; *Anderson* v. *Union Stock Yards Co.,* 77 Neb. 196, 109 N.W. 171.) In addition to rejecting the defendant's requested charge to the jury on assumption of risk (Record, 57), the Trial Court, with special and dramatic language, further told the jury that the doctrine, which was not mentioned in any part of the charge previously, was "out, period". This was a striking departure from the controlling decisions in the Nebraska courts, including *Fritchley* v. *Love-Courson Drilling Co., Inc.,* 177 Neb. 455, 129 N.W. 2d 515 (1964), decided at or about the same time; the *Fritchley* decision holds that such conduct as Strand's was negligence as a matter of law and that the doctrine of assumption of risk was applicable. The trial court's holding, and the refusal of the Court of Appeals to correct it, so far departs from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The need for the exercise of this Court's supervisory control is further substantiated because of the refusal of the courts below to follow Rule 60 (b), Federal Rules of

Civil Procedure. This occurrence was in 1960. Certain Safety Codes of the State of Nebraska, effective July 15, 1964, were received in evidence after the defense waived foundation as to their adoption (Record, 36) because of a letter tendered by the Plaintiff purporting to show they had been in effect at the time of the occurrence (App. 35; Defendant's Exhibit 12). It is beyond dispute that these Codes were not in effect at the time of the occurrence and that they included far more stringent requirements than the applicable regulations in 1960. The jury, therefore, was instructed by the Trial Court to hold the defendant duty bound to comply with safety standards that were not written or in effect until several years after the occurrence. The Circuit Court of Appeals refused to correct this wrong by granting relief under Rule 60 (b), Federal Rules of Civil Procedure, applicable to a situation where, by mistake, administrative rules not in effect at the time of an occurrence are received in evidence and form the basis of instructions to the jury.

In addition to the injustice to this Petitioner to be corrected, the supervisory authority of this Court should be exercised to remedy the departure by the Court of Appeals from the accepted and usual course of judicial proceedings under the Federal Rules.

Finally, the Affidavit of Loren Morris, one of the jurors (App. 28) shows the jury believed this Petitioner had insurance and a judgment against it would not affect it adversely. Likewise, they believed Wilmac was insolvent and that any award Strand might be granted against his employer would be unavailing. Under the law of Nebraska, the fact that insurance is not brought up during the course of the trial does not prevent stigma if the jury discusses insurance coverage and considers it in making up the ver-

dict. (*Pope* v. *Tapelt,* 155 Neb. 10, 50 N.W. 2nd 352.) The Federal Courts should have followed the Nebraska law relative to such misconduct of juries here. (*Koenig* v. *Frank's Plastering Company,* 227 F. Supp. 849.) The failure of the District Court and Court of Appeals below to follow the law of Nebraska on this point further demonstrates that this Petitioner is entitled to relief in this court.

CONCLUSION

For the reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 18,606 & 18,687

FARMERS CO-OPERATIVE ELEVATOR ASSOCIATION NON-STOCK OF BIG SPRINGS, NEBRASKA, a Cooperative Corporation,

Appellant,

v.

ARTHUR C. STRAND,

Appellee.

} Appeals from the United States District Court for the District of Nebraska.

[July 25, 1967.]

Before VAN OOSTERHOUT, BLACKMUN and LAY, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Defendant Farmers Co-operative Elevator Association Non-Stock of Big Springs Nebraska,[1] in case No. 18,606

[1] Plaintiff's employer, Wilmac Construction Company, and its workmen's compensation insurance carrier, American Mutual Liability Insurance Company, have been made parties defendant in this action because of subrogation rights based upon workmen's compensation payments made to plaintiff. No issue is pending on these appeals with respect to such defendants. For convenience and simplicity, we will in this opinion treat the defendant Farmers Co-operative Elevator Association as the sole defendant.

has appealed from final judgment entered May 16, 1966, upon a jury verdict for $200,000 in favor of plaintiff Arthur C. Strand for injuries sustained by a fall of over thirty feet asserted to have been proximately caused by the negligence of the defendant. In case No. 18,687, the appeal is from an order filed December 1, 1966, denying defendant's motion for relief from the judgment hereinabove described under the provisions of Rule 60(b), Fed. R. Civ.P. Jurisdiction, based upon diversity of citizenship and the requisite amount, is established.

Plaintiff Strand on October 19, 1960, the date of the accident, was an employee of Wilmac Construction Company working on a construction project on defendant's premises which was undertaken under the provisions of a cost-plus contract between Wilmac and the defendant. On the day of the accident, the defendant was engaged in conducting its usual business operations on the premises while the construction work was progressing. The trial court found as a matter of law that the defendant had at least joint control over the elevator premises at the time of the accident and such determination is not challenged on this appeal.

Plaintiff just prior to the accident had been working in the head house located some thirty feet above the floor of the elevator building. After he had completed his work for the day, about 6 p.m., he was injured while descending on a ladder leading from the head house to the ground floor. The ladder had been installed by the defendant long prior to the commencement of the construction work and defendant had authorized its use by Wilmac's employees. It was also used by defendant's own employees in connection with the elevator operation.

Plaintiff alleged that his injuries were proximately caused by defendant's negligence in the following respect: Failure to erect, construct and maintain the ladder from which plaintiff fell in a safe, suitable and proper manner as required by the statutes of Nebraska; failure to provide adequate light and ventilation; failure to exercise ordinary care to keep the premises in a reasonably safe condition; failure to exercise reasonable precaution for plaintiff's safety and the creation of a hazardous condition by the operation of the elevator while the construction work was in progress.

Defendant admitted the happening of the accident, denied all allegations of negligence on its part, and affirmatively alleged contributory negligence on the part of the plaintiff which was more than slight, and assumption of risk.

Errors relied up by defendant for reversal of the judgment may be summarized as follows:

I. Denial of defendant's timely motion for directed verdict made at the close of all the evidence and its motion for judgment n. o. v.

II. Refusal of the trial court to give a requested assumption of risk instruction and giving instead an instruction to the effect that assumption of risk is not an issue in the case.

III. Refusal of the court to grant a new trial upon the basis of a juror's affidavit asserting misconduct of the jury in the jury room, and refusal to summon jurors for interrogation with respect to the asserted misconduct.

IV. Denial of defendant's Rule 60(b) motion.

A consideration of the issues raised in the light of the record satisfies us that the trial court committed no preju-

dicial error and hence the judgment entered against defendant is entitled to be affirmed for the reasons hereinafter set out. We shall discuss the errors urged in the order in which they are stated.

I.

Defendant's motions for directed verdict and for judgment n. o. v. raised the issues which are asserted in this appeal to the effect that there is no substantial evidentiary support for finding defendant guilty of any asserted specification of negligence or a finding that the negligence, if any, was the proximate cause of the plaintiff's injuries and additionally urged that the record conclusively establishes that plaintiff as a matter of law was guilty of contributory negligence more than slight, and had assumed the risk of injury.

The accident occurred in Nebraska. The parties appear to be in agreement that the substantive law of Nebraska controls. We pointed out in *Chicago, Burlington & Quincy R.R.* v. *Beninger,* 8 Cir., 373 F.2d 854, 856, that it is still an open question as to whether state or federal law controls on the issue of sufficiency of the evidence to support a verdict. We then went on to say that Nebraska and federal standards for resolving such issue are substantially the same. We quoted and followed the standards stated in *Wray M. Scott Co.* v. *Daigle,* 8 Cir., 309 F.2d 105, 108-09, a case arising out of Nebraska. We shall follow the same course here. We also cited and followed Nebraska cases holding that the evidence should be viewed in the light most favorable to the prevailing party, giving him the benefit of all reasonable inferences which may reasonably be drawn from the evidence, and further held that when a conflict in evidence exists, questions of negli-

gence, proximate cause and contributory or comparative negligence are ordinarily fact questions for resolution by the jury.

Continental Can Co. v. *Horton,* 8 Cir., 250 F.2d 637, resembles our present case in many respects. There an employee of the contractor working on defendant-owner premises was injured by falling from a defective scaffold belonging to the owner. The contractor was authorized to use the scaffold, the owner's employees likewise using it at times. That case was tried before Judge Delehant, an able and experienced Nebraska federal judge. The affirming opinion upon appeal was written by Judge Woodrough, a Nebraska judge who has had a long and distinguished career on this court. In *Continental Can,* as here, reliance was placed upon R.R.S., Neb., 1943, § 48-425, which reads:

> "All scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances used in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct or other structure, shall be erected and constructed in a safe, suitable and proper manner. . . ."

Defendant in our present case urges that the statute just quoted is inapplicable for two reasons, to wit, (1) it applies only to an employer and defendant is not plaintiff's employer; and (2) the statute does not cover maintenance of the ladder.

In *Continental Can,* similar contentions were rejected. We there squarely held that the owner in possession was responsible to the employee of the contractor for the failure of the scaffold furnished by the defendant-owner to meet the statutory safety standards. Ladders and scaf-

folds are both covered by the pertinent statute heretofore cited.

We also held that the owner in possession had a duty under the statute to maintain the equipment. We stated:

> "Therefore under Nebraska law the erection of a scaffold which is neither safe, suitable, nor proper is not merely evidence of negligence but is negligence per se and the issue, therefore, is not whether defendant exercised due care in erecting the scaffold, but whther the scaffold was in fact erected and maintained in a safe, suitable and proper manner." 250 F.2d 637, 642.

We find nothing in the Nebraska cases which indicates the interpretation we made of § 48-425 is erroneous and hence we adhere to the interpretation of the statute made in *Continental Can.*

When the law as above stated is applied to the facts in this case, we are satisfied that a jury issue on the negligence of defendant and proximate cause is made out.

The descent by the ladder from the head house is made through an opening in the head house floor 27¼ inches long and 15½ inches wide. Plaintiff is a rather large man and had a tool belt about his waist at the time of the descent. The evidence discloses that some twisting is necessary to get through the opening. The first rung of the ladder below the head house floor had been removed by the contractor to facilitate passing through the opening. Several protruding nails were left where the rung had been removed. Plaintiff testified that a person cannot see downward while going through the opening but has to feel his way and be somewhat of a contortionist to work his way down. He further testified:

> "I started to go down through the opening in the floor on the ladder, and I had put my left foot down through the opening, and in the dark there I finally got my foot set solidly down on the rung, and then I brought my other foot down through the opening and I got my body through, at least the lower portion of my body through the opening, and then as I started to move my right foot off this step and go on down to the next rung on down the ladder, it snagged on my pants. . . . Somewhere around my knee there was a nail on the ladder there and it snagged on my pants and I just—I lost my balance and the other foot, my left foot, which was still on the ladder rung, slipped off and I started falling backwards, and from there on I just fell all the way to the ground."

Plaintiff admitted while on the witness stand that he had made a prior inconsistent statement to the effect that as he went down he inserted his foot below a rung and started to slip down. Plaintiff's credibility was for jury determination and it is for the jury to determine which version of the accident to accept. Additionally, there is evidence that there was considerable dust in the air and on the floor and ladder rungs caused by the operation of the elevator and that such dust impaired visibility and made surfaces slippery. There is also testimony, which is contradicted, to the effect that it was dark at the time of the accident and that there were no lights in the head house.

We are also unable to say as a matter of law under the circumstances disclosed that plaintiff was guilty of contributory negligence more than slight. It is quite true that he was aware of the missing rung, but the jury could find that he exercised the care of a reasonably prudent man under the circumstances in attempting to descend the ladder.

We hold that the court committed no error in overruling defendant's motions for directed verdict and judgment n. o. v.

II.

Defendant made a timely request for instructions on the issue of assumption of risk. Such instructions were rejected. The court instead instructed the jury that the assumption of risk doctrine had no place in the case but then went on to say that the issue of contributory negligence as previously explained and defined remained for the jury's consideration. Defendant urges that the court erred in so instructing and in refusing to give the requested assumption of risk instructions. The court assigned no reason for taking the action just complained of.

R.R.S. § 48-435 reads:

> "Buildings; construction, violations; assumption of risk. The continuance by any person in the employ of any such operator shall not be deemed an assumption of risk of such employment."

We held in *Continental Can* and hereinabove that an owner in possession is responsible to an employee of a contractor for defects in equipment such as scaffolds and ladders. Sections 425 and 435 are found in the same chapter of the code which covers safety regulations. When the chapter is considered as a whole, we believe that it may be fairly said that the legislature by § 435 intended to eliminate the assumption of risk defense in favor of an employee as against any person responsible under § 425 for furnishing safe equipment.

As stated in 65A C.J.S. Negligence § 174(7) and supporting authorities there cited, "A person for whose protection a safety law, order, or regulation has been passed does not assume the risks of the dangerous condition resulting from a violation thereof."

Moreover, we find additional support for the trial court's refusal to give the assumption of risk instructions in testament Torts 2d § 496 E which reads:

> "Necessity of Voluntary Assumption
>
> (1) A plaintiff does not assume a risk of harm unless he voluntary accepts the risk.
>
> (2) The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to
>
> (a) avert harm to himself or another, or
>
> (b) exercise or protect a right or privilege of which the defendant has no right to deprive him."

Such principle appears to have been adopted in Nebraska in *Schwab* v. *Allou Corp.*, 128 N.W.2d 835, 841. In that case, a tenant in an apartment building was injured in crossing an icy passage which it was the duty of the owner of the building to maintain and keep safe. Plaintiff knew all exits from the building were icy but had to get out of the apartment to carry on her employment. In holding the assumption of risk defense inapplicable, the court states:

> "Assumption of risk is predicated upon an implied consent to be treated negligently. If the person against whom the doctrine is applied is deprived of a choice in the matter, the risk is not assumed, although it may be encountered."

Similary, in our present case, the evidence shows no alternate safe means available to plaintiff to leave the work station which was safer than the means chosen.

III.

Defendant moved for a new trial upon the basis of facts asserted in an affidavit of one of the jurors to the effect that the jurors discussed the likelihood of insurance coverage and its effect and that they gave inadequate consideration to and misinterpreted the court's instructions. Defendant also asked that the members of the jury be summoned for examination. The court properly denied such request and the motion for a new trial.

The items set out in the juror's affidavit all related to matters which took place in the jury room and which inhere in the verdict. It is a well-established rule in the federal courts and the Nebraska court that a jury verdict may not be impeached as to occurrences in the jury room which inhere in the verdict by an affidavit of a juror. *McDonald* v. *Pless,* 238 U.S. 364; *Stephenson* v. *Steinhauer,* 8 Cir., 188 F.2d 432, 439; *United States* v. *Kansas City, Mo.,* 8 Cir., 157 F.2d 459. 460; *Koenig* v. *Frank's Plastering Co.,* D.C.Neb., 227 F.Supp. 849, 850-51; *Kohrt* v. *Hammond,* Neb., 70 N.W.2d 102, 105; *Pope* v. *Tapelt,* Neb., 50 N.W.2d 352, 356.

Moreover, a motion for a new trial is ordinarily addressed to the sound discretion of the trial court and is not subject to review absent an abuse of discretion. *Bankers Life & Cas. Co.* v. *Kirtley,* 8 Cir., 307 F.2d 418, 423; *Johnson* v. *Hill,* 8 Cir., 274 F.2d 110, 117. No abuse of discretion has here been shown.

IV.

Lastly, we reach defendant's contention that the court erred in denying its motion pursuant to Rule 60(b), Fed. R. Civ. P., for relief from final judgment. Defendant

asserts that because of mistake, excusable neglect of counsel, inadvertence and surprise, Exhibit 26 was wrongfully received in evidence. Exhibit 26 consists of the American Standard Safety Code for building construction accompanied by a foreword which states such code has been adopted in Nebraska pursuant to statutory authority. It is accompanied by letter from the Nebraska Safety Engineer certifying such code was in effect from 1940 to date.

Defendant's counsel objected to the exhibit as incompetent, irrelevant and immaterial and in response to questions asked by the court expressly waived foundation as to the adoption of the regulations and specifically conceded that the regulations were in full force and effect on the date of the accident, October 19, 1960.

The court in its instructions to the jury upon the basis of the concession that the now disputed regulations had been adopted advised the jury that such safety regulations had been adopted pursuant to Nebraska law and had the force and effect of a statute. A number of provisions of the safety code relating to ladders were incorporated in the instructions and the jury was advised that violation of the regulations constituted negligence per se. Appropriate instructions as to proximate cause were given. Defendant's objection to the safety regulation instructions were limited to lack of materiality and relevancy and the further ground that a grandfather clause made the regulations inapplicable to ladders constructed prior to a certain date and that there was no evidence as to when the ladder was constructed.

Defendant in his 60(b) motion filed some four months after the entry of final judgment for the first time raised the objections now under consideration to the effect that such regulations were not operative on the date of the

accident because: (1) The provisions of the Nebraska administrative act, § 84-901 et seq., R.R.S. Neb., were not complied with in the attempted adoption of the regulations. (2) The regulations contained in Exhibit 26 do not apply as the attached foreword contains the provision that safety code regulations "shall apply in all cases not specifically covered by Nebraska regulations" and existing regulations already covered safety requirements for construction of ladders.

We believe the defendant is precluded from raising such issues here because of the stipulation made at the trial that regulations contained in Exhibit 26 were in effect at the time of the accident. The general rule is that parties are bound by stipulations voluntarily made and that relief from such stipulations after judgment is warranted only under exceptional circumstances. See *Osborne* v. *United States,* 8 Cir., 351 F.2d 111, 120; *Jackson* v. *United States,* 8 Cir., 230 F.2d 679, 681; *Burstein* v. *United States,* 8 Cir., 232 F.2d 19, 22.

Defendant in its 60(b) motion does not assert that the stipulation was induced by any fraud or misconduct on the part of the plaintiff or his counsel. Evidence was introduced at the 60(b) hearing from which it would appear that the regulations here in controversy were adopted in conformity with the administrative procedure act in 1964. There is also evidence which tends to show that on prior occasions various safety regulations including American Standard Safety Code for building construction were adopted. No representative from the State Department testified with respect to the regulations and considerable uncertainty exists as to just when the safety regulations

here involved were first adopted. The record does not conclusively establish such regulations were not in effect on the date of the accident. We are unable to definitely ascertain from the record whether or not such regulations were in effect and we make no adjudication upon such point.

Moreover, it is established law that 60(b) motions provide for extraordinary relief and that they may be invoked only upon a showing of exceptional circumstances and the ruling of the trial court upon such motions should be set aside only upon a clear showing of abuse of discretion. *Di Vito* v. *Fidelity & Deposit Co.*, 7 Cir., 361 F.2d 936, 938; *Curtis Publishing Co.* v. *Butts*, 5 Cir., 351 F.2d 702, 717; *Ohliger* v. *United States*, 2 Cir., 308 F.2d 667, 668.

The record of adoption of the safety regulations was available to defendant in the State office in which it was filed. If defendant chose to raise the issue of lack of proper procedure in the adoption of the regulations, defendant should have made the necessary investigation or at least should have required plaintiff to lay the proper foundation for the introduction of Exhibit 26. (Defendant's conduct in these respects shows a lack of diligence on his part and does not fall in the category of excusable neglect.)* See *Ohliger* v. *United States*, supra; *In Re Wright*, D. C. Mo., 247 F.Supp. 648, 659. Exhibit 26 did not purport to show that compliance with the detailed requirements of the Nebraska administrative procedure act had been followed and hence defendant was not misled by the exhibit in this respect.

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* Parenthetical materials stricken in CCA Order on Petition for Rehearing.

Relevant facts to be considered by the court in determining whether or not 60(b) relief should be granted have been thus stated:

> "[I]f relief is sought from a judgment rendered after a trial on the merits, whether the movant had a fair opportunity to present his claim or defense; whether there are any intervening equities which make it inequitable to grant relief; and any other factor that is relevant to the justice of the judgment under attack, bearing always in mind that the principle of finality of judgments serves a most useful purpose for society, the courts, and the litigants—in a word; for all concerned." *United States* v. *Gould*, 5 Cir., 301 F.2d 353, 356.

It is far from clear that any prejudicial error resulted from the giving of the instructions based upon the safety code standard. An ample basis existed under the record for a finding of negligence apart from the safety code items. The trial court by its presence at all stages of the trial had the feel of the case and thus was in a favorable position to determine whether the error complained of was prejudicial and likewise was in a position to determine whether the error complained of brought about a miscarriage of justice. Additionally, we note that no exceptions were taken to the instructions submitting to the jury the various provisions of the safety code upon the grounds now urged. We hold that the defendant has failed to establish an abuse of discretion in the court's order overruling his 60(b) motion.

The judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT
(Filed May 16, 1966)

This action came on for trial before the Court and a jury, Honorable Richard E. Robinson, Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict:

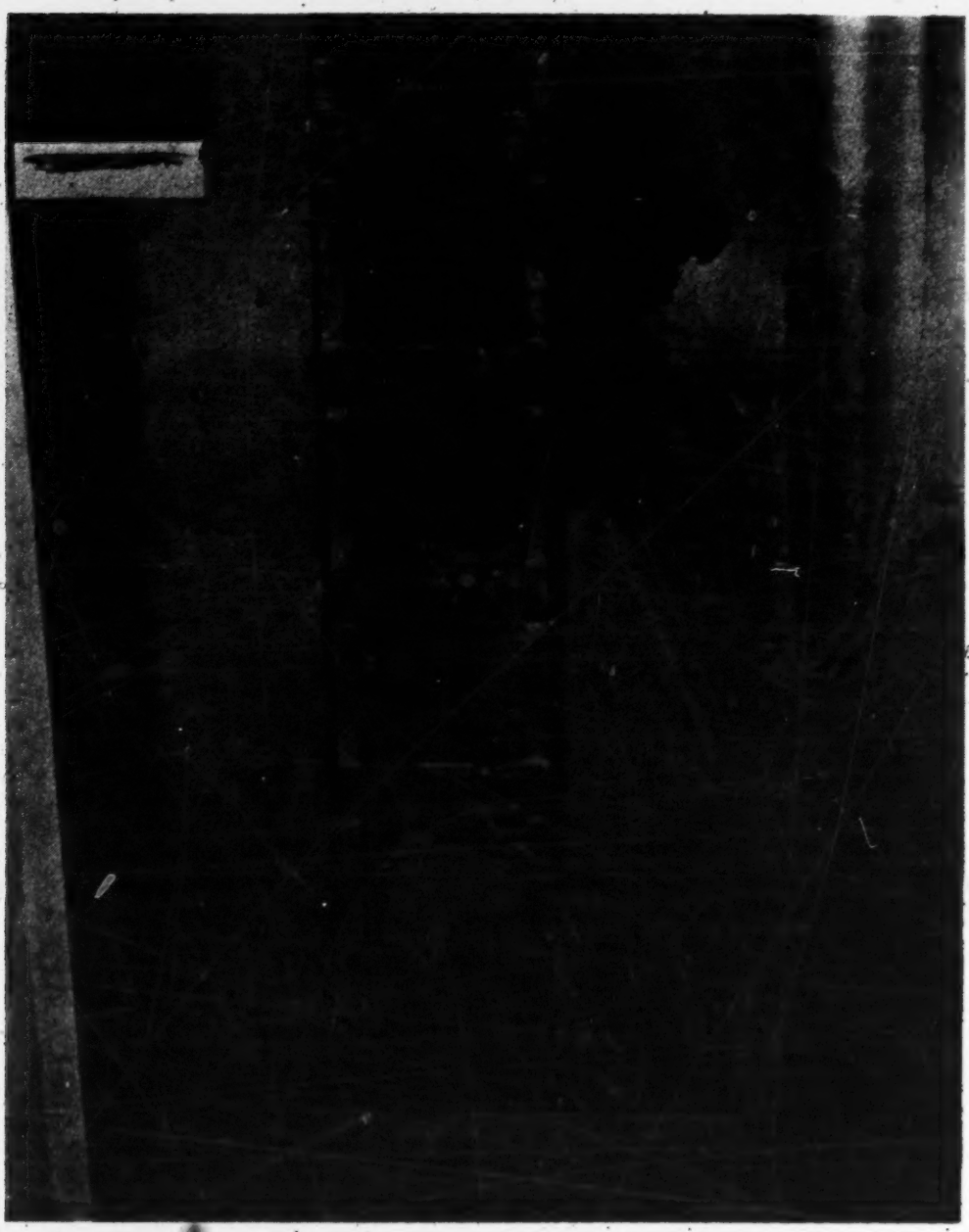
It is ordered and adjudged:

That the plaintiff, Arthur C. Strand, recover of the defendant, Farmers Co-Operative Elevator Association Non-Stock of Big Springs, Nebraska, a Cooperative Corporation, the sum of Two Hundred Thousand Dollars and No/100 ($200,000.00), with interest thereon at the rate of six per cent per annum as provided by law, and taxable costs of this action.

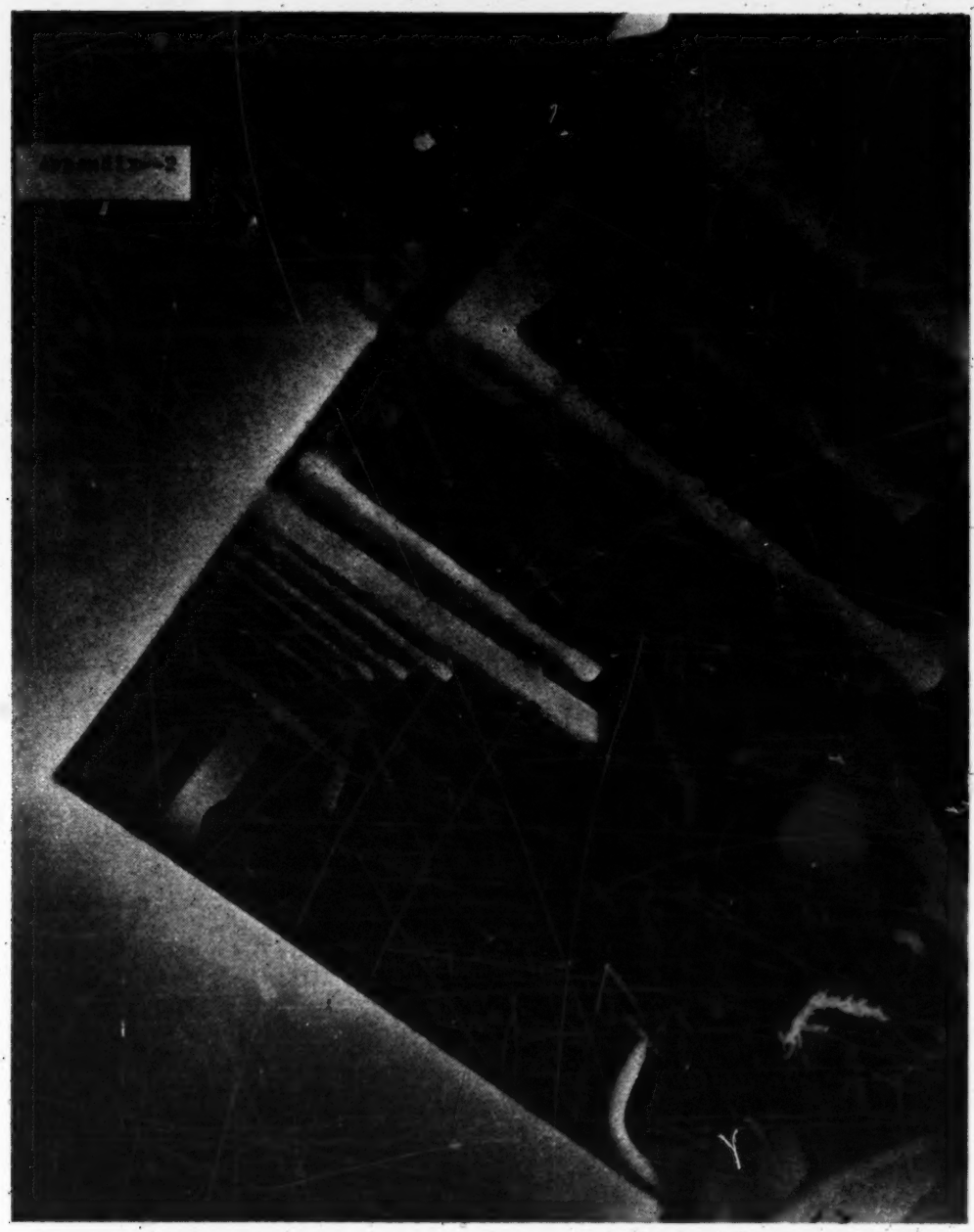
Dated at North Platte, Nebraska, this 16th day of May, 1966.

Richard C. Peck
Clerk of the Court
By /s/ Paul D. Kellogg
Deputy Clerk

PLAINTIFF'S EXHIBIT 2



PLAINTIFF'S EXHIBIT 3



APPENDIX B

FOREWORD

The following regulations have been adopted by the Nebraska Department of Labor in conformity with provisions of 48-412, compiled Statutes of Nebraska 1929. They are based on recognized safe practices and on the provisions of the National Safety Codes approved by the American Standards Association, which Safety Codes are hereby adopted by the Nebraska Department of Labor, and shall apply in all cases not specifically covered by the Nebraska regulations.

The safety regulations of the Department of Labor shall apply to all new installations made after the date of adoption of these regulations and to all existing installations and conditions that are not equipped with safety devices and guards, or constructed, maintained and operated in accordance with these regulations. In existing installations where safety equipment has been provided, upon a proper showing to the Nebraska Department of Labor that the guards or safety devices afford adequate protection, such equipment may remain in use until such time as it needs to be replaced, at which time such new equipment shall conform to the requirements of these regulations.

Any modification or waiver of these regulations by the Department of Labor or its authorized agent is justified only in temporary or emergency construction or in other particular cases when the regulations are shown for any reason to be impracticable, such as the involving of an expense not warranted by the protection afforded: provided, always, that equivalent or safer protection is secured by other means.

Hereafter, the manufacture, sale or purchase of any machine or mechanism for use in the State of Nebraska, which said machine or mechanism does not conform to the provisions of these Safety Codes, is hereby prohibited.

PLAINTIFF'S EXHIBIT 26 (Page 2)

SECTION 1
General

1.1 Except where either permanent or temporary stairways or suitable ramps or runways as required by this code are provided, ladders shall be provided to give access to all floors or to scaffolds or platforms where work is being performed more than five (5) feet above ground or to a permanent or temporary floor. This requirement may be waived, where other acceptable means of access has been provided, as to needle beam scaffolds or floats as used in steel construction.

1.2 Ladders as required by this code shall be left in place until the permanent or temporary stairways are provided and ready for use, and such stairways shall be erected when a building or piece of construction has reached a point sixty (60) feet above the ground.

1.3 The following types of commercially manufactured ladders shall comply with the American Standard Safety Code for Construction, Care and Use of Ladders (ASA A14-1935):

(*a*) Portable ladders
(*b*) Extension ladders
(*c*) Portable stepladders
(*d*) Sectional ladders
(*e*) Trestle and trestle extension ladders

Essential data for their use by the building contractor is included therein.

1.4 Ladders which are to remain as a part of the permanent structure after completion of building operations shall conform to any local, state or municipal codes which may be applicable.

SECTION 2
Wood Side Rails

2.1 Wood side rails shall be made from Eastern spruce, Sitka spruce, or approved equivalent. Material should be seasoned, straight-grained wood, free from shakes, checks, decay, or other defects which will impair its strength. Low density woods should not be used.

2.2 Side rails shall be dressed on all sides, sharp edges eliminated, and free from splinters.

2.3 All knots shall be sound and hard, and material containing loose knots shall not be used. They shall not appear in the narrow face of the rail, and when in the wide face, shall be not more than one-half (½) inch in diameter, and shall not be within one-half (½) inch of the edge of the rail or nearer than three (3) inches to a tread or rung.

2.4 Pitch pockets not exceeding one-eighth (⅛) inch wide, two (2) inches long and one-half (½) inch in depth are permissible in wood side rails provided that not more than one (1) appears in each four (4) feet of length.

SECTION 3
Rungs, Steps, or Cleats

3.1 Rungs and cleats shall be made of white ash, oak, or hickory, or other approved wood of equal strength. Wood steps shall be made of wood permitted for side rails. They shall be made from thoroughly seasoned material, free from shakes, pitch pockets, injurious checks, knots, decay, or other defects, and shall not be made from low density wood.

3.2 Cross grain in rungs, cleats, and steps shall not be allowed.

3.3 A uniform step spacing shall be used, which shall not exceed twelve (12) inches.

3.4 Wood rungs shall be inserted in holes bored in the side rails, which holes shall extend through the side rails.

3.5 The rungs shall extend through and flush with the outside face of the rail.

3.6 All holes for rungs shall be located on the center line of the wide face of the side rails.

3.7 The size of the hole shall be such as to ensure a driving fit for the rung.

3.8 The shoulder of round wood rungs shall be forced firmly against the side rail and the tenon secured in place by nails, care being taken to avoid splitting the tenon.

3.9 Wood treads shall be inset in the side rails not less than three-sixteenths (3/16) of an inch, fastened thereto by nails or screws, and further secured by braces, bolts, tie rods, or the equivalent.

3.10 Wood cleats shall be housed into the edges of the side rails not less than one-half (½) inch, or filler blocks used instead of housing, and the cleats shall be nailed to each rail with three (3) 10 d wire nails, or fastened with through bolts.

3.11 Metal rungs shall be made of solid round steel rods, standard steel pipe or angle sections and securely fastened to the side rails by riveting, bolting, or welding.

3.12 Metal treads shall be flanged downward not less than two (2) inches at each end and secured to each side rail by two (2) bolts or rivets. Safety type treads may also be used with angle supports at each end.

3.13 All bolts and rivets shall have a close fit in the holes prepared to receive them.

PLAINTIFF'S EXHIBIT 26 (Page 3)

SECTION 4

Cleat Ladders

4.1 A single-section cleat ladder more than thirty (30) feet in length shall not be used.

4.2 Cleats shall be of the material used for side rails, straight-grained and free from knots, and shall be housed into the face of side rails one-half (½) inch, and fastened with nails or through bolts.

SECTION 5

Portable Ladders

5.1 Portable ladders more than thirty (30) feet in length shall not be used.

5.2 All portable ladders shall be built with spread side rails. The width between side rails at the base shall in no case be less than eleven and one-half (11½) inches for ladders up to and including ten (10) feet in length. For longer ladders this width shall be increased at least one-quarter (¼) inch for each additional foot of length.

SECTION 6

Tables of Material Sizes — Wood Ladders

6.1 Minimum sizes for wood side rails are given in Table 4.

6.2 Minimum sizes for rungs and cleats are given in Table 5.

SECTION 7

Fixed Ladders

7.1 Fixed ladders shall have parallel sides of either wood or metal.

7.2 Fixed ladders shall be firmly secured in place by top, bottom, and intermediate fastenings as required.

7.3 When fixed ladders are spliced, the splice plates shall be the same depth as the side rails.

7.4 The length of splice plates for metal or wood side rails shall be four (4) times the depth of the side rail. If of metal, they shall be not less than one-fourth (¼) of an inch in thickness and chamfered on all exposed edges. If made of wood, they shall be not less than one (1) inch thick and six (6) times depth of side rail in length.

7.5 Splice plates shall be secured by bolts or rivets with the heads countersunk or of the button type.

7.6 The heads shall be on the outside of the rail.

7.7 The bolts or rivets shall be not less than one-half (½) inch nor more than five-eighths (⅝) inch in diameter.

7.8 The bolt ends shall be chamfered with only the chamfered end extending beyond the nut.

7.9 Both ends of the rivet shall be button shape.

7.10 Washers shall be placed under the nuts and rivet ends on wood side rails.

TABLE 4. Minimum Sizes for Wood Side Rails

Length of Ladder (Feet)	Rung Type Ladder		Cleat Ladder	
	Thickness (Inches)	Depth (Inches)	Thickness* (Inches)	Depth* (Inches)
Up to and including 19	1⅛	2½	1⅝	3½
Over 19, up to and including 23	1¼	2¾	1⅝	3½
Over 23, up to and including 25	1⅜	2¾	1⅝	3½
Over 25, up to and including 27	1⅜	2¾	1⅝	3½
Over 27, up to and including 30	1⅜	2¾	1⅝	3½
Over 30, up to and including 33	1⅝	3		

*Finished sizes are shown; 1⅜ x 3½ (2 x 4 stock size) is minimum permitted for cleat ladders.

TABLE 5. Minimum Sizes for Rungs and Cleats

Length (Inches)	Rungs		Cleats	
	Center Diameter (Inches)	Tenon Diameter (Inches)	Thickness (Inches)	Width (Inches)
Up to and including 24	1⅛	⅞		
Over 24, up to and including 32	1⅛	⅞		
Up to and including 20			2⅛	3
Over 20, up to and including 30			2⅛	3½

Plaintiff's Exhibit 26 page 3

Appendix B-5

7.11 There shall be a minimum of three (3) bolts or rivets on each side of the joint for metal side rails and a minimum of four (4) bolts or rivets for wood side rails.

7.12 Bolts and rivets in both metal and wood side rails shall be staggered in position.

7.13 The pitch of a fixed ladder shall not be such that a man's position is below the ladder when climbing.

7.14 The distance from front of rungs to nearest permanent object on the climbing side of the ladder shall be not less than thirty (30) inches, and the distance from back of rungs to the building or structure to which it is fastened shall be not less than six and one-half (6½) inches.

7.15 The fastenings shall be made of material equivalent in strength to the side rails and of sufficient length to allow the minimum distance between building and rung of ladder as mentioned in rule 7.14.

7.16 There shall be a width of at least fifteen (15) inches across the front of the ladder from center to center of rails.

7.17 The maximum distance between fastenings or braces shall not be in excess of ten (10) feet for ladders over fifteen (15) feet in length.

SECTION 8

Portable Stepladders

8.1 Portable stepladders over twenty (20) feet in length shall not be used.

8.2 Stepladders shall be so constructed that when in the open position the front section shall have a minimum slope of three and one-half (3½) inches and the back section a minimum slope of two (2) inches for each twelve (12) inch length of side wall. There shall be a spread at the bottom between the front and back section equal to at least five and one-half (5½) inches for every foot of length of ladder.

8.3 Stepladders shall be so constructed that when in the open position all treads shall be level.

8.4 The minimum width between side rails at top step, inside to inside, shall be not less than twelve (12) inches with a spread of at least one (1) inch for each foot of length of stepladder.

8.5 A locking device or spreader to hold the front and back sections securely in open position shall be an integral part of each stepladder. This device shall have all sharp metal points removed or covered to protect the user.

8.6 The steps of stepladders shall not be made of material having knots exceeding one-half (½) inch in diameter.

8.7 All metal parts shall be malleable iron, wrought iron, or steel.

8.8 The back section shall be suitably cross-braced to provide a rigid frame.

8.9 Each step shall be reinforced by a metal tie rod or a metal brace.

SECTION 9

Extension Ladders

9.1 No extension ladder exceeding sixty (60) feet in length when extended shall be used.

9.2 No extension ladder shall have more than two (2) sliding sections.

9.3 Each sliding section shall be equipped with a metal shackle and pulley, raised and lowered by means of a rope, and shall be equipped with two (2) automatic locks of an approved type.

9.4 Locks and guide irons shall be of such construction as to make the extension ladder equal in strength to a ladder of equal length constructed of continuous side rails.

9.5 All parts of the lock shall be malleable iron, steel, or other approved material, except the spring and bushing which shall be of non-corrodible material.

9.6 All other metal parts of the ladder shall be of malleable iron, wrought iron, steel, or other approved material.

9.7 Frayed or badly worn rope shall not be used on extension ladders.

SECTION 10

Trestle and Extension Trestle Ladders

10.1 Trestle ladders over twenty (20) feet in length shall not be used and the base section or extension section of extension trestle ladders over twenty (20) feet shall not be used.

10.2 Trestle ladders and base section of extension trestle ladders shall be so spread that the width of the trestle at the bottom, inside to inside, is equal to or greater than five and one-half (5½) inches per foot of length of ladder.

10.3 The bearings shall consist of rungs not less than one and one-quarter (1¼) inches in diameter, with seven-eighths (⅞) inch tenons mortised into the side rails at least seven-eighths (⅞) inch, or if of oval bars not less than three-quarters by two (¾ x 2) inches mortised into the side rails.

10.4 Bearings shall be spaced not more than eighteen (18) inches apart on centers.

10.5 Bearings shall be equivalent in strength and construction to rungs of other ladders.

10.6 The minimum distance between side rails of trestle ladders and the extension section of trestle ladders shall be not less than twelve (12) inches.

10.7 The spread of the side rails for trestle and base of extension trestle ladders shall be not less than one (1) inch per foot of length of ladder.

10.8 The extension section shall have parallel side rails.

10.9 The tops of side rails of trestle and base sections of extension trestle ladders shall be cut on a bevel to prevent them from spreading.

10.10 A locking device or spreader to hold the front and back sections securely in an open position and each pair of side rails rigidly parallel to one another shall be an integral part of each ladder.

10.11 The locking device for securing the extension section to the base shall be of an approved design.

10.12 All metal parts shall be of malleable iron, wrought iron, steel, or other approved material.

SECTION 11

Sectional Ladders

11.1 The over-all length of a sectional ladder shall not exceed thirty-one (31) feet.

11.2 The bottom and intermediate sections shall not exceed a length of six (6) feet and four (4) inches and the top section shall not exceed a length of nine (9) feet.

11.3 The connection joint shall be not less than one (1) foot and shall fit closely without binding or unnecessary play.

11.4 Each grooved end of the sections shall be reinforced with a metal plate of not less than No. 18 U.S. gage metal properly secured thereto, and a rivet above the groove extending through the depth of the rail.

11.5 Sectional ladders may be made up of sections having spreading sides, in which case they will not be interchangeable in their position in the ladder, or they may be made up of interchangeable sections with or without a top section having converging rails and a bottom section having flaring or spreading side rails.

11.6 The top section having converging side rails shall have a width at the top not less than four (4) inches.

11.7 Rungs shall be not less than one and one-eighth (1⅛) inches in diameter with seven-eighths (⅞) inch tenons mortised into the side rails at least seven-eighths (⅞) of an inch and spaced not more than twelve (12) inches apart center to center.

SECTION 12

Manhole Ladders

12.1 Manhole ladders more than twenty (20) feet in length shall not be used.

12.2 The rung spacing of a manhole ladder shall not exceed fifteen (15) inches.

12.3 The side rails of a manhole ladder shall be parallel and have a minimum inside width between the rails of twelve (12) inches.

12.4 The side rails and rungs of a manhole ladder shall be made of mild steel or other metal of equivalent strength.

SECTION 13

Roof Ladders

13.1 Roof ladders shall be constructed with either metal or wood side rails and rungs, and to conform to the specifications for fixed ladders (see Section 7, page 69).

SECTION 14

Cage

14.1 A cage or basket guard shall be placed on all permanently fixed external ladders more than twenty (20) feet in length where such ladders are employed in regular service.

14.2 The cage shall extend from a point seven (7) feet above the base to the top of the ladder with the bottom flared out not less than four (4) inches.

14.3 Cages shall be of metal, substantially built and securely fastened to the ladder. The inside shall be clear of projections.

14.4 The cage shall be not less than twenty-four (24) inches in width and shall project not less than twenty (20) inches nor more than twenty-four (24) inches from face of ladders.

SECTION 15

Landings

15.1 Where landing platforms are provided at the top of ladders such landing shall be not less than twenty-four (24) inches in width, and provided with guardrails except in those sections which give access to the ladders.

15.2 Where fixed ladders are used to ascend to heights exceeding thirty (30) feet, landing plat-

forms shall be provided for each thirty (30) feet or section thereof, and the ladder sections shall be offset, each from the other.

15.3 Where the installation condition requires offset sections of ladders, the sections shall be joined by the landing platform.

15.4 Fire ladders and fixed ladders provided with cages may be excepted from this requirement.

15.5 The side rails of fixed ladders shall extend at least three and one-half (3½) feet above the roof or landing platform, and the upper end shall be goose-necked, unless other convenient and secure hand holds are provided at such places. The rungs shall be omitted from this extension.

15.6 The side rails of all portable ladders shall extend not less than three and one-half (3½) feet above the platform or floor served, and the landing rung shall be at the level or above the floor or platform. The rungs above the platform should be omitted.

15.7 When a ladder is used to gain access to a roof and the employee must step a greater distance than eighteen (18) inches from ladder to roof, a landing platform shall be provided, and the top rung shall be above such landing.

15.8 The top rung of any section of fixed ladder shall be at the level or above the adjacent landing platform.

15.9 All landing platforms shall be equipped with standard railings so arranged as to give safe access to the ladder.

SECTION 16

Care and Use of Ladders

16.1 When portable ladders are used, they should be inclined so that the horizontal distance from the foot of the ladder to a plumb line dropped from the upper point of support is approximately one-fourth (¼) of the ladder length from the base to the upper point of support. In case of necessity, where a ladder is placed more nearly vertical, it should be fastened to prevent tipping. If placed more nearly horizontal, it should be braced to prevent sagging.

16.2 Portable ladders should be so placed that the side rails have a secure footing. The top rest should be rigid and have ample strength to support the applied load and the top of the ladder should be nailed or otherwise securely fastened to prevent movement.

16.3 If a ladder is to be placed against a window frame, a board shall first be spiked across the side rails at the top.

16.4 Separate ladders for ascending and descending should be provided in building construction of more than two (2) stories in height, or where traffic is heavy.

16.5 Where it is necessary to install a ladder wide enough to permit traffic in both directions at the same time, a center rail shall be provided. One side of the ladder should be plainly marked "up" and the other side "down."

16.6 Ladders with broken or missing rungs or steps, broken or split side rails, or other faulty or defective construction shall not be used. When ladders with such defects are discovered, they shall be withdrawn from service and marked for repair or destruction.

16.7 Single portable ladders over thirty (30) feet in length shall not be used. If greater heights are to be reached, separate ladders shall be used and intermediate landing platforms provided.

16.8 Ladders made by fastening cleats across a single rail shall not be used.

16.9 Single short ladders shall not be spliced together to provide long sections.

16.10 A stepladder shall never be used as a working platform.

16.11 Ladders shall not be placed or used in elevator shafts or hoistways, except where used by workmen engaged in work within such shafts or hoistways, and then they shall be protected from objects falling from operations at higher elevations in or adjoining the shaft.

16.12 Portable ladders, where used on smooth floors or other smooth surfaces, shall be equipped with non-slipping bases, or otherwise secured to prevent displacement.

16.13 Ladders shall not be painted. They may be preserved, if desired, with linseed oil, shellac, spar varnish, or other suitable transparent protective coating.

DEFENDANT'S EXHIBIT 21

DEFENDANT'S EXHIBIT 29

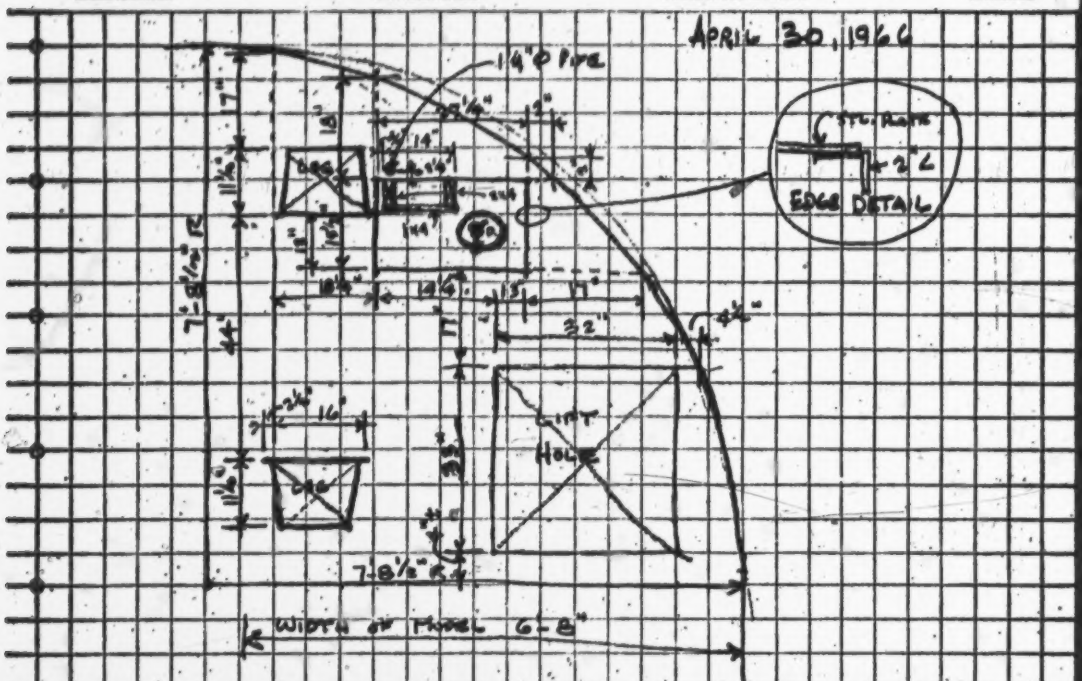
INLAND SCHOKBETON

DIVISION OF NEBRASKA PRESTRESSED CONCRETE COMPANY

P. O. BOX 4208 • TELEPHONE 402 434-6384 • LINCOLN NEBRASKA 68529

ROGER W. CATTS, SALES MANAGER
CARROLL D. JOHNSON, CONTRACT SALES
RALPH E. KOSTA, PROJECT COORDINATOR
BILL HOGAN, ESTIMATOR

APRIL 30, 1966



FLOOR PLANS OF MODEL

NOTE: 1. PLATFORM HEIGHT ABOVE FLOOR 34'-2"
2. LIFT HOLE & LEG OPNGS. DO NOT NEED TO BE CUT OUT BUT SHOULD BE CLEARLY MARKED

DEFENDANT'S EXHIBIT 29 STIPULATED

Appendix-B 10

SCHOKBETON — The finest in architectural, structural, precast concrete by the exclusive process as originally developed in Holland.

DEFENDANT'S EXHIBIT 29 (Page 2)

INLAND SCHOKBETON

DIVISION OF NEBRASKA PRESTRESSED CONCRETE COMPANY
P. O. BOX 4208 • TELEPHONE 402 434-6384 • LINCOLN NEBRASKA 68529

ROGER W. CATTS, SALES MANAGER
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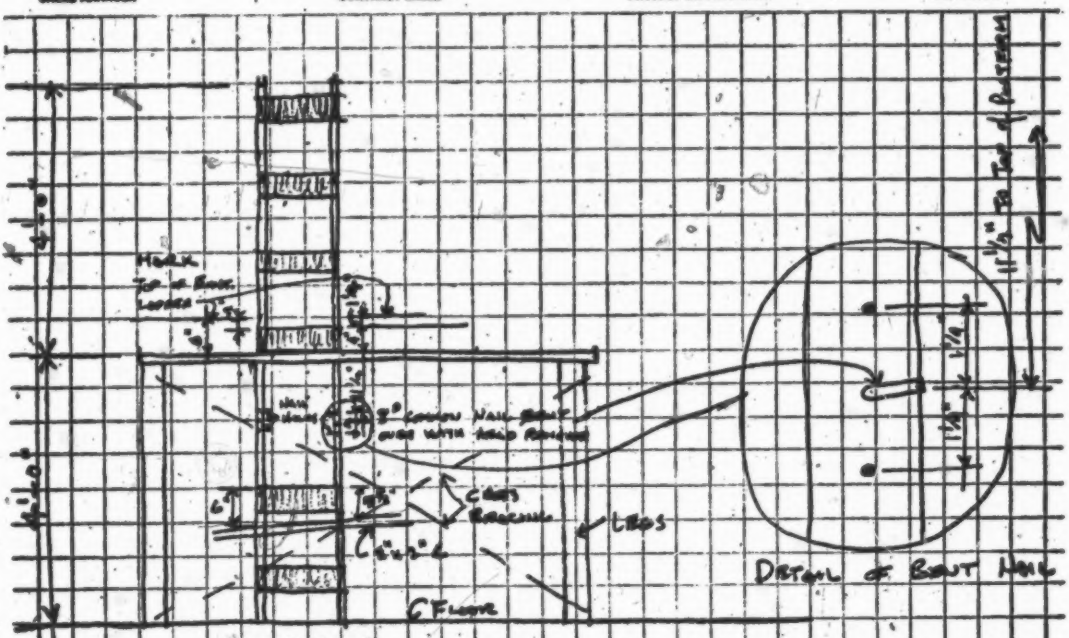

NOTE: 1. Ladder must go thru 7'-0" high door.
2. Must be assembled in 15 min. in court room.
3. Ladder must be secured so that man can climb

Defendant's Exhibit 29 page 2

B
Appendix 11

SCHOKBETON — The finest in architectural, structural, precast concrete by the exclusive process as originally developed in Holland.

DEFENDANT'S EXHIBIT 32

PLAINTIFF'S EXHIBIT 1

STATE OF NEBRASKA)
) ss
COUNTY OF LINCOLN)

Loren Morris, being first duly sworn, on oath, deposes and says:

1. That he was a juror who sat on the above entitled case.

2. That he participated in the discussion of the case in the jury room after the case had been submitted to the jury.

3. That in the course of said discussion, statements were made by various jurors to the following effect:

a) That the Farmers Cooperative Association of Big Springs, Nebraska, defendant herein had insurance coverage, and a judgment against it would not cause an adverse and serious economic effect.

b) That there is a case pending by the Farmers Cooperative Association of Big Springs, defendant herein, against Wilmac Construction Company, for the recovery of any judgment which would be rendered against the Farmers Cooperative Association.

c) That Wilmac Construction Company was insolvent, but nevertheless, said Wilmac Construction Company had insurance at the time of the accident, and it was concluded that said insurance coverage would be available regardless of insolvency.

d) That it was the stated impression of the jurors that the Instructions as read by the Court required the jury to return a verdict for the Plaintiff.

e) That only selected instructions were read in the jury room, and that the statement was made to the effect that "there was no use to go through all of the Instructions, just the ones on the State Safety Code".

f) That the jury concluded, that under the Instructions in order to render a verdict they needed to consider only three elements:

1. That the Farmers Cooperative Association, defendant herein, owned the ladder, and it was on its premises.

2. That the ladder in some way was "illegal".

3. That the plaintiff fell from the ladder.

4. Further Affiant says not.

Loren Morris

SUBSCRIBED and sworn to before me a Notary Public for the State of Nebraska on this 23 day of May, 1966.

William B. Craig
Notary Public

DEFENDANT'S EXHIBIT 1

STATE OF NEBRASKA

Department of State

Frank Marsh, Secretary of State of the State of Nebraska does hereby certify that

DEPARTMENT OF LABOR

of the State of Nebraska did on August 7, 1964, file in the office of the Secretary of State a document entitled, "American Standard Safety Code for Building Construction" with the notation that the contents of said document were adopted as a safety code by said Department of Labor to be effective July 15, 1964.

It is further certified that said filing was the first filing of said document and that no part thereof and specifically pages 67 to 72, both inclusive, had never previously been filed for adoption as regulations by said Department of Labor in the office of the Secretary of State.

It is further certified that Exhibit 1, attached hereto and made a part hereof by this reference, consists of copies of a title page, the index, the forward and Rule 37 of a document filed for adoption as regulations by the Department of Labor of the State of Nebraska with the Secretary of State on December 2, 1958, entitled, "Nebraska Safety Codes for Factories and Workshops."

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Nebraska.

Done at Lincoln this first day of September in the year of our Lord, one thousand nine hundred and sixty-six

Frank Marsh
SECRETARY OF STATE

Frank Marsh

DEFENDANT'S EXHIBIT 1 9/19/66

DEFENDANT'S EXHIBIT 2

ASA
Reg. U.S. Pat. Off.
A10.2-1944

American Standard Safety Code for

Building Construction

Approved June 7, 1944
American Standards Association

SPONSORS

American Institute of Architects
National Safety Council

DEFENDANT'S EXHIBIT 2

DEFENDANT'S EXHIBIT 3

STATE OF NEBRASKA

I certify that the copy hereto attached is a true copy of the rules of the Department of Labor relating to American Standard Safety Code for Building Construction (adopted after public hearing held on 12th day of June, 1964) and that the original rules are on file in this Department.

This is an amendment superseding all other rules previously filed.

The Effective Date of the foregoing amendment is July 15, 1964.

Dated August 4, 1964

SEAL

(If Agency has one)

.....

Commissioner of Labor

DEFENDANT'S EXHIBIT 4

STATE OF NEBRASKA

I certify that the copy hereto attached is a true copy of the rules of the Department of Labor relating to Safety Codes for Construction Work, Factories and Workshops.

The Effective Date of the foregoing rules is April 1, 1938.

Dated Dec. 2, 1958

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DEFENDANT'S EXHIBIT 6

STATE OF NEBRASKA
Department of Labor
Lincoln
September 22, 1966

Subject: Construction Code.
In Effect December 2, 1958
to August 7, 1964

Mr. Wm. B. Craig
8601 Dodge Street
Omaha, Nebraska

Dear Sir:

On May 9, 1966 we sent a Photo copy of Page 3 of the above named code to Mr. Wm. P. Mueller.

Very truly yours,
Department of Labor
Ben Zersen
State Safety Engineer

BZ:jh

DEFENDANT'S EXHIBIT 12

Wm. P. Mueller
c/o Clerk of U.S. District Court
Post Office Building
North Platte, Nebraska
Dear Sir:

I, Ben Zersen, hereby certify that the attached Safety Codes were in effect from 1940 until this date.

The first paragraph of the foreword reads in part: the National Safety Codes approved by the American Standards Association, which Safety Codes are hereby adopted by the Nebraska Department of Labor, and shall apply in all cases not specifically covered by the Nebraska regulations.

Very truly yours,

Division of Safety
Ben Zersen
State Safety Engineer

Bz:r
Enclosure

DEFENDANT'S EXHIBIT 13

May 6, 1966

Wm. P. Mueller
401 North Spruce
Ogallala, Nebraska

Dear Mr. Mueller:

As per our telephone conversation, we are enclosing the material we talked about.

You will note the A.S.A. regulation covers all ladders used in construction. This would apply according to our Foreword.

Page twenty-eight (28) of our code covers lighting and ventilation.

Very truly yours,

Division of Safety
Ben Zersen
State Safety Engineer

BZ:r
Enclosure

PLAINTIFF'S EXHIBIT 14
Filed Dec. 2, 1958

NEBRASKA
SAFETY CODES

—— o ——

Adopted by
STATE DEPARTMENT OF LABOR
Lincoln, Nebraska
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FOREWORD

The following regulations have been adopted by the Nebraska Department of Labor in conformity with provisions of 48-412, Compiled Statutes of Nebraska 1929. They are based on recognized safe practices and on the provisions of the National Safety Codes approved by the American Standards Association, which Safety Codes are hereby adopted by the Nebraska Department of Labor, and shall apply in all cases not specifically covered by the Nebraska regulations.

The safety regulations of the Department of Labor shall apply to all new installations made after the date of adoption of these regulations and to all existing installations and conditions that are not equipped with safety devices and guards, or constructed, maintained and operated in accordance with these regulations. In existing installations where safety equipment has been provided, upon a proper showing to the Nebraska Department of Labor that the guards or safety devices afford adequate protection, such equipment may remain in use until such time as it needs to be replaced, at which time such new equipment shall conform to the requirements of these regulations.

Any modification or waiver of these regulations by the Department of Labor or its authorized agent is justified only in temporary or emergency construction or in other particular cases when the regulations are shown for any reason to be impracticable, such as the involving of an expense not warranted by the protection afforded; provided, always, that equivalent or safer protection is secured by other means.

Hereafter, the manufacture, sale or purchase of any machine or mechanism for use in the State of Nebraska, which said machine or mechanism does not conform to the provisions of these Safety Codes, is hereby prohibited.

(Page 3)

(c) During the construction or demolition of any structure more than one story high, all exterior door openings and passageways to the exterior shall be protected by substantial overhead protections. Where there is no sidewalk shed the protection shall project at least eight (8) feet from the structure.

(d) When a foot bridge is used, it shall be substantially built and shall be provided with handrails on both sides.

Rule 9—Ladders and Temporary Stairs.

(a) Unless runways are used, and until permanent stairs are available, ladders or temporary stairs of ample strength shall be provided to give access from one floor to another in all portions of the structure after the structural flooring is in place. They shall be of such size and so located as to give proper facilities to all persons on the work.

(b) Ladders shall be secured against slipping, and the siderails shall extend at least thirty-four (34) inches above the platform or floor served. The rungs of temporary ladders shall be sunk into the siderails to a depth of at least one-half (½) inch. The siderails shall not be less than two (2) inches by four (4) inches, standard sawn, in cross section. Two-way traffic ladders shall be at least four (4) feet wide with a center rail equal in cross section to the side rails.

(c) Ladders shall be provided before the structural floors are started and above the top floor on which the structural flooring has been placed. Platforms shall be provided at the top and bottom of such ladders, and they shall be at least two (2) feet longer than the width of the ladder, and with a width of at least three (3) feet.

(d) Temporary stairways shall be supported by substantial stringers and shall have treads at least two (2) inches by eight (8) inches. The stairways shall be provided with handrails in accordance with the requirements for permanent stairways.

Rule 10—*Permanent Stairways.*

(a) Open sides of permanent stairways shall be provided with substantial temporary planed wood handrails, between thirty-three (33) and thirty-nine (39) inches in height, measured from the center of the tread.

(b) Stairways on which treads and landings are to be filled in later shall have temporary wood treads and landings, to the height of the nosing, full width of the tread and landing, firmly fitted in place and replaced when worn below the level of the metal nosing.

(c) Where skeleton iron stairs are installed, they shall have wood treads and landings at least two inches thick.

Rule 11—*Floor Openings.*

All openings in floors, except such sides as are necessarily open for immediate use, shall be protected by railings with toeboards. As an alternate method, openings may be planked over in a substantial manner.

Nebraska Safety Regulations governing use of ladders.

48-425. SCAFFOLDS OR STAGING: SAFETY RAILS. All scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances used in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct or other structure, shall be erected and constructed in a safe, suitable and proper manner. Scaffolding or staging, swung or suspended from an overhead support and more than twenty feet from the ground floor, shall have, where practicable, a safety rail properly bolted, secured and braced, rising at least thirty-four inches above the floor or main portion of such scaffolding or staging, and extending along the entire length of the outside and ends thereof and properly attached thereto, and such scaffolding and staging shall be so fastened as to prevent the same from swaying from the building or structure.

Nebraska Safety Regulations relating to assumption of risk.

48-435. BUILDINGS; CONSTRUCTION; VIOLATIONS; ASSUMPTION OF RISK. The continuance by any person in the employ of any such operator shall not be deemed an assumption of the risk of such employment.

Nebraska Safety Regulations relative to the adoption of Safety Codes.

48-412. SAFETY APPLIANCES; CODES AND STANDARDS. All safety appliances prescribed by sections 48-401 to 48-424 shall be subject to the approval of the Department of Labor. The department is directed and empowered to formulate, adopt, publish and enforce such safety codes, orders, rules and standards as it deems necessary, in order

that all employments and places of employment shall be, in all respects, so constructed, equipped, arranged, operated and maintained as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein and frequenting the same, as the nature of the employment will reasonably permit. Such codes as may be adopted shall be subject to modification, amendment or repeal at any time, in the discretion of the department.

Rules of Administrative Agencies defined.

84-901. ADMINISTRATIVE AGENCIES; DEFINITIONS. (1) Agency means each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules, except the Adjutant General's office as provided in Chapter 55, the courts, including the Nebraska Workmen's Compensation Court, and the Legislature; (2) Rule means any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure but not including regulations concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public, and not including permits, certificates of public convenience and necessity franchises, rate orders, and rate tariffs, and any rules of interpretation thereof, and for the purpose of this act every rule which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests.

Rules of Administrative Agencies, Filing Requirements.

84-902. AGENCY; RULES; CERTIFIED COPIES FILED WITH SECRETARY OF STATE; OPEN TO PUBLIC INSPECTION; REGULATIONS. Each agency shall file forthwith in the office of the Secretary of State a certified copy of the rules in force and effect in such agency on August 10, 1945. A certified copy of any rule adopted after August 10, 1945 shall likewise be so filed. Such copy or copies shall be printed, typed or mimeographed on legal size paper, properly indexed and bear the effective date. The Secretary of State shall keep a permanent file of all such rules, which shall be open to public inspection during regular business hours of his office. The Secretary of State in order to maintain and keep such files current, shall be empowered to require new and amended rules to be filed as complete file pages and to remove all superseded pages to a separate file. The Secretary of State shall prescribe regulations for carrying out the provisions of this act to include: (1) Manner of certification of rules filed under this act; (2) form of indexing the file of each agency; (3) method of filing amendments to the rules; (4) manner in which copies shall be made available to the public from the office of Secretary of State; and (5) the price per copy, unless otherwise specifically provided by statute.

Rules of Administrative Agencies, Publication.

84-903. AGENCY; RULES; PUBLISH. Each agency shall cause its rules to be published in such manner as the agency shall determine, to bring, as far as practicable, the existence and scope of the rule to the attention of all persons affected thereby.

Rules of Administrative Agencies, Approval of Attorney General.

84-905.01. AGENCY; RULES; ATTORNEY GENERAL; APPROVAL; FAILURE TO MEET REQUIREMENTS OF CONSTITUTION AND STATUTES; REPORT. The certified copy of each amendment or rule adopted under this act subsequent to the effective date thereof, shall be submitted to the Attorney General for his consideration, and his approval or disapproval thereof shall be attached to and filed with such amendment or rule in the office of the Secretary of State. Thirty days prior to the next regular legislative session, the Attorney General shall have examined the file of each agency as it appears in the office of the Secretary of State, and shall approve same or file a report with the Clerk of the Legislature in the form of an opinion on each rule which in his opinion fails to meet the requirements of the Constitution and laws of the United States and the State of Nebraska.

Rules of Administrative Agencies, Effective only if filed with Secretary of State.

84-906. AGENCY; RULES; NOT EFFECTIVE UNLESS CERTIFIED COPY FILED WITH SECRETARY OF STATE; EXCEPTION; PRESUMPTION. No rule required under this act to be filed with the Secretary of State shall be valid as against any person until the certified copy of the rule shall have been so filed; and, unless otherwise specifically provided by law, such filing of any rule shall, except where notice by publication is insufficient in law, be sufficient to give notice of the contents of such rule to any person subject thereto or affected thereby. The filing of any rule as herein provided shall give rise to a

rebuttable presumption that it was duly and legally adopted.

Rules of Administrative Agencies, Hearing.

84-907. AGENCY; RULES; ADOPTION; AMENDMENT; REPEALED; PUBLIC HEARING; NOTICE; EXCEPTION. No rule shall be adopted, amended or repealed by any state agency except after public hearing on the question of adopting, amending, or repealing such rule. Notice of such hearing shall be given at least ten days prior thereto by publication in a newspaper having general circulation in the state. All such hearings shall be open to the public. The Governor in writing prior to the adoption, amendment, or repeal of any rule may waive, for good cause shown, the provisions of this section.

Rules of Administrative Agencies; Effective Adoption.

84-908. AGENCY; RULES; ADOPTIONS; AMENDMENTS; REPEALED; APPROVAL BY GOVERNOR OR ATTORNEY GENERAL. No adoption, amendment or repeal of any rule shall become effective until the same shall have been approved by the Governor, except rules of the Nebraska State Railway Commission, which shall not become effective until approved by the Attorney General.

Nebraska Safety Regulations, Right to Adopt Safety Codes.

48-413. SAFETY CODES; COMMISSIONS TO ESTABLISH; INSPECTIONS. The Department of Labor shall, from time to time, create commissions composed of employers, employees, and such other persons as the department may designate, to assist it in formulating, adopting,

amending or repealing such codes, orders, rules and standards. Before any code is adopted, amended or repealed there shall be a public hearing thereon, notice of which hearing shall be given such publicity as the department deems necessary. The department may make or cause to be made such investigations and surveys as will assist in the formulation and modification of such codes, orders, rules and standards.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 698

FARMERS CO-OPERATIVE ELEVATOR ASSOCIATION NON-STOCK OF BIG SPRINGS, NEBRASKA, a Cooperative Corporation, *Petitioner.*

VS.

ARTHUR C. STRAND, *Respondent*

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

BRIEF OF THE RESPONDENT IN OPPOSITION

STATUTES INVOLVED

In addition to the statutes mentioned in the petitioner's brief, Nebraska's comparative negligence statute, Section 25-1151, set forth in Appendix "C", *infra,* p. 12, is pertinent to this matter.

QUESTIONS PRESENTED

Each of the "Questions Presented" set out in the petitioner's brief assumes an inaccurate or erroneous basic premise of fact or law. Thus, respondent submits the following questions involved:

A.

Is the owner-operator of a grain elevator liable for negligence resulting in injuries to an employee of a contractor working on the elevator when the owner-operator maintains control of the premises during completion of the work?

B.

Under the law of Nebraska is a workman engaged in the renovation of a building entitled to the protection of Nebraska's statutory safety regulations?

C.

May a litigant, via Rule 60(b), Federal Rules of Civil Procedure, avoid a binding stipulation entered into freely and voluntarily at trial when no exceptional circumstances, abuse of judicial discretion, or error in the stipulation itself have been shown?

D.

May an affidavit of a juror, concerning matters which inhere in the verdict, impeach a jury verdict in Nebraska?

STATEMENT OF THE CASE

Insufficiency and inaccuracy of petitioner's Statement of the Case require the following Statement by respondent:

The contract between petitioner and repsondent's employer, Wilmac Construction Company, was a "cost-plus" agreement with petitioner to pay all "costs" including all materials, supplies, structural accessories

and all other items required for the proper execution of the work. In keeping with this agreement, petitioner provided means of access to the headhouse of the elevator where respondent was working prior to his accident.

The headhouse was located some thirty feet above the floor of the elevator. It was reached by two means, both provided by petitioner:[1] (1) The ladder; (2) a man-lift. The man-lift carried only one person and was so constructed that a person in the headhouse could not raise the man-lift when it was on the ground. At the time of respondent's accident, the man-lift was on the ground.

Without dispute,[2] petitioner maintained control of the premises during construction. Petitioner operated the elevator during construction and on the accident date. This caused extreme conditions of dust in the headhouse. The dust landed on all surfaces, making them slick; it got in the eyes of workmen, hampering vision; and it clogged breath and lungs.

At about 6:30 p.m. on the accident date, respondent started down the ladder. The hazardous conditions of dust were present; it was also dark. Respondent had never descended the ladder under either condition. With the man-lift inaccessible, the ladder was re-

---

[1] As The Circuit Court of Appeals noted: "The ladder had been installed by the defendant long prior to the commencement of the construction work and defendant had authorized its use by Wilmac's employees. It was also used by defendant's own employees in connection with the elevator operation."

[2] In the language of the Circuit Court: "On the day of the accident, the defendant was engaged in conducting its usual business operations on the premises while the construction work was progressing. The trial court found as a matter of law that the defendant had at least joint control over the elevator premises at the time of the accident and such determination is not challenged on this appeal." (Pet. App. 2).

spondent's only reasonable way out of the headhouse. Respondent slipped from the ladder and fell; the injuries paralyzed his body below the waist. The jury determined the factual questions for respondent in its verdict.

During the trial petitioner, with full possession of all relevant facts, waived foundation to certain safety codes adopted by the Nebraska Department of Labor. Four months later, petitioner sought to escape the waiver of foundation by moving for relief under Rule 60(b) Federal Rules of Civil Procedure, claiming the safety rules were not in effect at the time of the accident. Evidence offered by respondent at the hearing showed otherwise. For this, and other reasons,[3] the motion was overruled.

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[3] The Circuit Court stressed: "We believe the defendant is precluded from raising such issues here because of the stipulation made at the trial that regulations contained in Exhibit 26 were in effect at the time of the accident. The general rule is that parties are bound by stipulations voluntarily made from such stipulations after judgment is warranted only under exceptional circumstances. . . . Defendant * * * does not assert the stipulation was induced by any fraud or misconduct on the part of plaintiff or his counsel. Evidence was introduced at the 60(b) hearing from which it would appear that the regulations here in controversy were adopted in conformity with the administrative procedure act in 1964. There is also evidence which tends to show that on prior occasions various safety regulations including American Standard Safety Code for building construction were adopted * * * The record of adoption of the safety regulations was available to defendant in the State office in which it was filed. If defendant chose to raise the issue of lack of proper procedure in the adoption of the regulations, defendant should have made the necessary investigation or at least should have required plaintiff to lay the proper foundation for the introduction of Exhibit 26 * * * Exhibit 26 did not purport to show that compliance with the detailed requirements of the Nebraska administrative procedure act had been followed and hence defendant was not misled by the exhibit in this respect. (Pet. App. 12-13).

Finally, petitioner, after the verdict, submitted an affidavit concerning purported discussion and speculative statements of jurors on matters that in Nebraska, for years, have been held to inhere in the verdict. Indeed, examination of the affidavit (Pet. App. 28-29) makes it clear the jury was not, in fact, apprised of any fact of insurance or that "any award Strand might be granted against his employer would be unavailing."

ARGUMENT

Each of the questions petitioner seeks to raise is, simply, based on a premise or assumption incompatible with the facts in this case or Nebraska law.

The "safe ladder" duty imposed by Section 48-425, R.R.S., Neb. 1943, Reissue of 1960 (Pet. App. B. 41) is clearly placed upon owners in possession of buildings where work is being done. The Nebraska law on this point was carefully analyzed in *Continental Can Company* v. *Horton,* 250 F. 2d 637, cited at length in the opinion of the Circuit Court in the case at bar. The application of rule in the case at bar is supported by a long line of Nebraska cases, including *Strahl v. Miller,* 97 Neb. 820, 151 N.W. 952; *Stevens v. Luther,* 105 Neb. 184, 180 N.W. 87; *Winterson v. Pantel Realty Co.,* 135 Neb. 472, 282 N.W. 393; *Johnson v. Weborg,* 142 Neb. 516, 7 N.W. 2d 65; *Quist v. Duda,* 159 Neb. 393, 67 N.W. 2d 481; *Baer v. Schaap,* 168 Neb. 578, 97 N.W. 2d 207 and *Fosler v. Aden,* 175 Neb. 535, 122 N.W. 2d, 494.

Petitioner's misconception of Nebraska law is pointed up by its insistence, on pages 3 and 11 of its brief in this Court that Nebraska is "unequivocally a 'contributory negligence' jurisdiction." Since the

adoption of its comparative negligence statute in 1913, (Res. App. C. 1) Nebraska has certainly not been an unequivocal contributory negligence jurisdiction. The test under the statute is, of course, not based on absolute degrees of negligence but rather upon a comparative test of the relative degrees of negligence. *Andelt v. County of Shepherd,* 157 Neb. 527, 60 N.W. 2d 604. If, on all the evidence, reasonable minds might fairly differ in their conclusion as to the existence of contributory negligence or as to its degree being more than slight in the circumstances, the question is for the jury to determine. *Surface v. Safeway Stores, Inc.,* 8 Cir. 169 F. 2d 937, 939-940 (Neb.), Cf., *Halliday v. Raymond,* 147 Neb. 179, 181, 22 N.W. 2d 614.

Petitioner again, as it did before the Circuit Court, argues the fact question of respondent's actions, emphasizing respondent had ascended the ladder numerous times before the accident date. The argument ignores two vital points in respondent's testimony:

(1) He had never before descended the ladder under the conditions of darkness obtaining on the accident date.

(2) He had never before descended the ladder *after the elevator had been in operation causing the hazardous dust conditions.*

The instructions of the trial judge carefully delineated the duties and rights of the parties under Nebraska law of negligence (Record 64, 67, 68); the jury resolved the fact question adversely to the petitioner.

Petitioner's argument that the respondent assumed the risk of injury also ignores Nebraska law. The rule in Nebraska *even when no statute is involved,* is that assumption of risk is predicated upon an implied con-

sent to be treated negligently. If the person against whom the doctrine is applied is deprived of a choice in the matter, the risk is not assumed, although it may be encountered. *Schwab v. Allou Corporation,* 177 Neb. 342, 128 N.W. 2d 835. The respondent had no other reasonable way out of the headhouse than the defective ladder provided for him by the petitioner; a ladder rendered doubly—and latently—dangerous by petitioner's operations causing the dust conditions.

Moreover, by statute, Section 48-435, R.R.S. Neb. 1943, Reissue of 1960, (Pet. App. B. 41) the defense of assumption of risk is rendered unavailable to petitioner in this case.

Again, similarly, petitioner chooses to present to this court the fact question of just how the fall occured. Petitioner's viewpoint that the fall was impossible is expressed at page 11 of its current brief. Respondent's version is set out in the record (R. 24-25). The jury, as on the other factual issues petitioner seeks to appeal, believed the respondent.

Petitioner, as it did before the trial court and Circuit Court, continues to dispute the existence of safety codes adopted by the Department of Labor of the State of Nebraska long before the accident. No less than three times prior to the accident, (Supp. R. 74, 75) the Department of Labor adopted and filed in the office of the Secretary of State of Nebraska construction safety codes adopting by reference the American Standard Safety Code under consideration in this case.

By statute, Section 48-412, R.R.S. Neb. 1943, Reissue of 1960, (Pet. App. B. 41, 42) the Nebraska Department of Labor "is directed and empowered to

formulate, adopt, publish and enforce such safety codes, orders, rules and standards it deems necessary * * * " The manner and type of publication of such codes is left to the discretion of the Department of Labor by Section 84-903, R.R.S. Neb. 1943 (Pet. App. B. 43).

Nonetheless, even though the record shows the rules were in effect, neither the right of the Department of Labor to adopt the rules or the manner in which the rules were adopted are relevant or material issues here. The issue, and the only issue, is whether the petitioner, charged with full notice that safety regulations were adopted by reference can, at trial, waive foundation to the regulations and then, months later, seek relief under Rule 60(b) by claiming the standards were not in force because they were adopted by reference.

The exhibits (Pl. Ex. 26; R. App. 3; 36; Def. E. 12; R. App. 23; Supp. R. 69) and record of the trial (R. 36) show clearly no basis for relief under Rule 60(b) exists in this case and no abuse of judicial discretion occurred. See *Laird v. Air Carrier Engine Service,* 263 F. 2d 948; *Jackson v. United States,* 330 F. 2d 679; *Ringling Bros.-Barnum and Bailey C. Shows v. Olvera,* 119 F. 2d 584. The matter was thoroughly examined and petitioner's claim rejected, by both the trial court and the Circuit Court. Indeed, as the Circuit Court pointed out:

> "It is far from clear that any prejudical error resulted from the giving of the instructions based upon the safety code standard. An ample basis existed under the record for a finding of negligence apart from the safety code items." (Pet. App. B. 14).

Finally, with reference to the affidavit of the juror, Morris, the law in Nebraska is, again, exactly the opposite of the position urged by petitioner. In the case of *Kohrt v. Hammond,* 160 Neb. 347, 70 N.W. 2d 102, the Nebraska Supreme Court ruled:

> "Complaint is made that there was talk in the jury room regarding insurance. The matter of insurance is not wholly relevant to the issues in this type of case. It is wholly impossible, however, to protect against the speculation and conjecture of jurors relative to this question. All have some personal information concerning it and it is too much to hope that it will not creep into a jury's discussion of the issue in this type of case. It is a matter which necessarily inheres in the verdict when it is based wholly on speculation and conjecture on the part of the jury. Affidavits of jurors may not be considered to impeach a verdict when the facts sought to be shown are such as would inhere in the verdict."

Cf. *Carpenter v. Sun Indemnity Co.,* 138 Neb. 552, 293 N.W. 400; *Koenig v. Frank's Plastering Company,* 227 Fed. Supp. 849 (Neb.) (1964).

CONCLUSION

Petitioner's application presents no basis for which a writ of certiorari should be granted. Rather, petitioner has simply presented again, argument on factual questions determined by the jury. The jury was fully and carefully instructed by the Trial Judge who had complete knowledge of relevant Nebraska law. The jury determined petitioner was negligent and that its negligence was the proximate cause of respondent's injuries. The United States Circuit Court of Appeals for the Eighth Circuit reviewed the entire

matter and unanimously agreed with the Trial Judge and jury.

The verdict and judgment have ample support in fact and law. The application for a writ of certiorari should be denied.

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APPENDIX C

25-1151. Actions for injuries to person or property; contributory negligence; comparative negligence. In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury.

Laws 1913, c. 124, Sec. 1, p. 311; R.S. 1913, Sec. 7892; C.S. 1922, Sec. 8834; C.S. 1929, Sec. 20-1151.

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No. 698

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FARMERS CO-OPERATIVE ELEVATOR ASSOCIATION NON-STOCK OF BIG SPRINGS, NEBRASKA a Cooperative Corporation,

Petitioner,

vs.

ARTHUR C. STRAND,

Respondent.

PETITION FOR REHEARING FROM ORDER OF THE SUPREME COURT OF THE UNITED STATES DENYING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH CIRCUIT

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Farmers Cooperative Association Non-Stock Of Big Springs, Nebraska, A Cooperative Corporation, by William Craig and Jess Nielsen, Paul D. Wilson and Jack E. Horsley, Of Counsel, its attorneys herein, hereby respectfully presents to the Court its Petition For Rehearing from the Order of this Court entered December 18, 1967 denying its Petition For Writ of Certiorari. Pursuant to Rule 58 of

the Rules of this Court, your Petitioner presents to the Court what it believes, in good faith, to be additional substantial grounds for granting the Petition For Certiorari available to the Petitioner although not previously presented herein, as follows:

Subsequent to the filing of Petition For Certiorari, the Supreme Court of Nebraska, under the law of which the cause of action here arose, has defined and delineated the substantive law of that jurisdiction beyond what it was at the time of the presentation of the Petition For Certiorari in this Court. The judgment of the U. S. District Court for the District of Nebraska and that of the Court of Appeals, Eighth Circuit, are irreconcilable with the law of the State of Nebraska, as it is now unequivocally defined.

Since Petition for Certiorari was filed in the instant case this Court has filed its decision in C.I.R. v. Estate of Bosch, in which the policy embraced in the Federal Judiciary on the compelling quality of State decisions is enunciated. (87 S.Ct. 1776 [1967].) On Pages 1782-1783 it is said:

> ". . . This Court has held that judicial decisions are 'laws of the . . . state' within the section . . . . Moreover, even in diversity cases this Court has further held that while the decrees of 'lower state courts' should be 'attributed some weight . . . the decision [is] not controlling . . . ' where the highest court of the state has not spoken on the point . . . This Court further held that 'an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise,*' . . . Thus, under some conditions, federal authority may not be

bound even by an intermediate state appellate court ruling. It follows here then, that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling. This is but an application of the rule of Erie R. Co. v. Tompkins, supra, where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, viz, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authority must apply what it finds to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court . . . (Emphasis added here.)."

To apply that principle as it should be to the case at bar, this Court should give consideration to and follow the holding of the Supreme Court of Nebraska in *Johnson* v. *Goodier,* published October 27, 1967, in Advance Sheets of Nebraska Reports, 182 Neb. 172, ... NW2d.....

This Petitioner respectfully submits that the law of Nebraska is thereby defined, by judicial construction following the filing of the Petition for Certiorari herein, in such terms as to make it inescapable that the Respondent, Arthur C. Strand, assumed the risk of the course of action upon which he engaged and that that risk was a proximate cause of his injuries. Therefore, under the law of Nebras-

ka, the judgments of the District and Circuit Courts are in error and violate the law of the State. The following excerpt from *Johnson* demonstrates this:

> "There is, however, another ground which would require us to arrive at the same conclusion. The petition indicates that, at the time of the accident, plaintiff was walking in a dark and unfamiliar place and did not stop to turn on lights as she proceeded. The following statement found in Prosser on Torts (2nd Ed.) § 77, p. 450, is pertinent here. 'The perils of darkness usually are held to be assumed by one who voluntarily proceeds into it; * * *.' In Wentink v. Traphagen, 138 Neb. 41, 291 N.W. 884, this court held: 'One who voluntarily walks about in total darkness in a strange place must of necessity know that he faces the danger of obstructions, pitfalls, accident, and injury. * * * Darkness alone calls upon a person to exercise greater caution for his own safety than is ordinarily required. * * * Where light has failed, obstructions have been encountered, and there are no especial circumstances requiring a person to proceed, he who goes forward into an unfamiliar dark space does so at his own risk, and if accident and injury follow, he is guilty of negligence, as a matter of law, which bars recovery.' In this case, the plaintiff walked in darkness in an unfamiliar place, encountered a door, opened it, and fell down the stairway. It appears that she, too, was guilty of negligence as a matter of law sufficient to bar recovery."

The Court reversed the judgment and granted a new trial because of error of the same nature, but actually less egregious, than the error in the case at bar.

In addition, we call this Court's attention to another decision of the Nebraska Supreme Court filed on November 24, 1967 in the case of *Kozloski* v. *Modern Litho, Inc.*

in the advanced sheets of Nebraska Reports, 182 Neb. 270 ..... N. W. 2d ..... In this case, the Nebraska Supreme Court considered the duty of a landlord to an invitee on his premises. The Court in its opinion stated as follows on page 274:

> " 'In order to impose liability for injury to an invitee, the dangerous condition must have been known to the owner or occupant or have existed for such time that it was his duty in the exercise of ordinary care to know of it.' 65 CJS, Negligence, § 63 (54), p. 770. See, also, Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N.W. 565. A landowner should not be held liable for defects which an investigation might reveal unless the situation suggests an investigation, and the facts indicate to a reasonable prudent man the likelihood of existence of some hidden danger to persons lawfully on the premises. See England v. Salamon (Mo. App.), 324 S.W.2d 765. 'There is negligence only where no care is exercised to avert a risk to others which reasonably should be apprehended.' Schild v. Schild, 176 Neb. 282, 125 N.W.2d 900. 'Generally speaking, no one is bound to guard against or take measures to avert that which, under the circumstances, a reasonably prudent person would not anticipate as likely to happen.' 38 Am. Jur., Negligence, § 24, p. 669. 'One may not be said to be negligent because he fails to make provision against an accident which he could not be reasonably expected to foresee.' Anderson v. Moser, 169 Neb. 134, 98 N.W.2d 703, 81 A.L.R. 2d 956.
>
> "An owner has a legal duty to exercise ordinary care to keep his premises safe for an invitee, but he is not an insurer.. Gorman v. World Publishing Co., 178 Neb. 838, 135 N.W.2d 868.
>
> "The basis of the present action is, in essence, that the defendant failed to inspect his premises, discover the ice in question, and either remedy the situation or

give warning thereof. It hinges entirely on the duty to inspect. When does such a duty arise? It must be borne in mind that this is an action founded upon negligence and as such is subject to the general rules of negligence. In accordance with the rules above set forth, it must, therefore, appear that under the circumstances existing in this case, a person of ordinarily (*sic*) prudence would have taken the precaution of making such inspection. We do not believe that the facts justify such a finding.

"It conclusively appearing that defendant did not have actual notice of the icy condition of which plaintiff complains, and that no circumstances existed which would have put an ordinarily prudent man on notice of the possibility of the existence of such a condition so as to reasonably require an inspection of the premises, it is evident that there is not sufficient evidence to support plaintiff's allegations of negligence, and that defendant's motion for directed verdict or, in the alternative, for a dismissal of plaintiff's petition should have been sustained."

Since the judgments in this case below, and the Order of this Court denying this Petitioner's Petition for Certiorari, "The highest court of the State has (now) spoken on the point * * * (and its) * datum for ascertaining state law * is not to be disregarded by a Federal Court, (there being no) * * persuasive data that the highest court of the State (Nebraska) would decide otherwise." (See Pages 1782-1783, *C.I.R.* v. *Estate of Bosche*, 87 S.Ct. 1776 [1967].)

Unless this Court, in the exercise of its supervisory power, takes jurisdiction of this case and harmonizes the outcome with the established applicable local law, confusion will exist in any case arising in Nebraska involving the doctrine of assumption of risk and, unless this Court intervenes, one rule of substantive law will apply in the

Federal Judiciary in Nebraska and another in the State Courts of that jurisdiction. The resulting uncertainty and dichotomy between the substantive law of the State and the substantive law applied in the Federal Judiciary will have discreditable impact on the administration of justice in this important field of civil rights in that jurisdiction.

In addition to the above compelling reason, two other factors have come into being since the filing of the original petition for a Writ of Certiorari with this Court. In November of 1967, a construction worker was accidentally killed on a sewer ditch project in Lincoln, Nebraska. The Nebraska State Safety Engineer, Ben Zersen, stated that an investigation of the construction site showed a violation of the State Safety Code. A request was made for the issuance of a Complaint because of this violation. Subsequently a question was raised as to the validity of the law and the effect of the State Safety Regulations. The matter was submitted to the Attorney General's office in the State of Nebraska to determine whether or not the Safety Regulations were "an unconstitutional grant of Legislative power to the Labor Commissioner." The Attorney General's office did issue an informal letter opinion to the Department of Labor wherein they found that it was unconstitutional for the Department of Labor to adopt regulations which defined a crime for the reason that it was an unlawful delegation of legislative power to an administrative agency. For this reason, no charges were pressed in the case of the death of the young workman. It should be noted that the opinion of the Attorney General's office reviewed only the criminal aspect, namely, Section 48-434 RRS Neb. 1943. Since there was no formal request for review of the civil aspects of that section of the Statutes, no express opinion was rendered by the Attorney General's office on that aspect. However, the Attorney

General's opinion was based, in great part, on the case of *Lincoln Dairy Co.* v. *Finigan*, 170 Neb. 777, 104 N.W. 2d 227, decided July 15, 1960, wherein the Nebraska Supreme Court held that a grant of power by the Legislature to the Director of the Department of Agriculture under which grant said Director was given the right to promulgate rules and regulations, including that a violation of such rules and regulations would be a criminal offense, was an unconstitutional delegation of legislative power to an administrative authority. Clearly, this demonstrates that the appellant in this case was deprived of his constitutional rights and property by the entry of a judgment based on an alleged violation of Safety Codes which were unconstitutional.

In the original Petition for a Writ of Certiorari, it was pointed out that the Safety Regulations which were presented at the time of trial and which formed the basis of the jury instructions given by the trial Court, were not, in fact, adopted until almost four years after the accident. Subsequent to the filing of the Petition for Writ of Certiorari, the United States Court of Appeals, 6th Circuit, in the case of *Vroman* v. *Sears, Roebuck and Co.*, Case No. 17216, ... F.2d .....,* filed on the 24th day of November, 1967, held that the admission of Safety Specifications was improper. In that case, the plaintiff was allowed to introduce into evidence as evidence of defective design, the American Standards Safety Specifications for power lawnmowers. The admission of these Safety Specifications was held to be improper where they were not formally adopted until some two years after the design and manufacture of

* Not yet nationally reported. Abstracted in Products Liability Report Number 118, Section 5873.

the mower in question. Such a holding is, of course, completely contrary to the holding of the Eighth Circuit in this case, wherein the Safety Specifications were not formally adopted until some four years after the accident in question. This conflict between the Circuits creates confusion in the Federal Courts as well as confusion in the State Court and this confusion must be eliminated.

Conclusion

This Petitioner urges upon this Court reconsideration of its Order denying Petition for Certiorari herein and, because of the existence of substantial additional grounds as stated above, respectfully prays that this Court will reconsider its Order and vacate it and allow Petition for Certiorari and hear and determine the issues of this cause on its merits.

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CERTIFICATE OF COUNSEL

The undersigned counsel for petitioner hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay, and the petition presents other substantial grounds available to petitioner although not previously presented, and said petition is restricted to the grounds above specified.

.....